(25,440)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 610.

GRANT N. JEFFERSON, MATTIE R. WASSON, AND WILLIE NOLAND JEFFERSON, WHO SUES BY HIS GUARDIAN, JOHN J. JEFFERSON, JR., PLAINTIFFS IN ERROR,

vs.

WILLIAM J. COOK AND ALBERT Z. ENGLISH, AS ADMINISTRATORS OF THE ESTATE OF F. B. SEVERS, DECEASED, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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a *Return to Writ.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I hereunto set my hand and affix the seal of the Supreme Court of the State of Oklahoma, in the City of Oklahoma City, this 6th day of May, 1916.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

1 *Petition.*

In the District Court of Okmulgee County, State of Oklahoma.

No. 3775.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND JEFFERSON, Who Sues by His Guardian, John J. Jefferson, Jr., Plaintiffs,

vs.

Wm. J. COOK and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. Severs, Deceased; Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a Corporation; Beaver Oil & Gas Company, a Corporation; Thurman Jefferson, and Rebecca Jefferson, Defendants.

I.

The plaintiffs say that the defendants, Thurman Jefferson, and Rebecca Jefferson, and the palintiff, Willie Noland Jefferson, are minors and that each of them are over the age of fourteen years; that John J. Jefferson, Jr., is the duly appointed qualified and acting guardian of the said Willie Noland Jefferson, and by and through whom said minor sues herein. The plaintiffs say that the Prairie Oil & Gas Company is a corporation organized and existing under the laws of the State of Kansas, with authority to do business in the State of Oklahoma; that the defendant Beaver Oil & Gas Company is a corporation organized under the laws of the State of Oklahoma, and that each of said corporations have power to contract and be contracted with, to sue and be sued, to plead and be impleaded; that Albert Z. English, and Wm. J. Cook are the administrators of the estate of F. B. Severs, deceased, and that as
2 the representatives of said estate they are made defendants in this action. That Mary Severs Owens, Bessie E. English,

and Annie S. Cook are the sole and only heirs at law of the said F. B. Severs, deceased.

The plaintiffs say that John J. Jefferson Jr., and Mary Alice Jefferson were husband and wife and citizens of the Creek Nation, and were enrolled opposite Roll Numbers 1045, and 1046 respectively; that the plaintiff Mattie R. Wasson, No. 1048, Grant N. Jefferson, No. 1049, Peggy Ann Jefferson, No. 1050, Thurman Jefferson No. 1051, Rebecca Jefferson, No. 1052, and Willie Noland Jefferson, No. —, are the children of the said John J. Jefferson Jr., and Mary Alice Jefferson; That they are also citizens of the Creek Nation, and the sole heirs at law of said Mary Alice Jefferson (all the aforesaid persons are Freedman Citizens of the Creek Nation).

That Plaintiffs say that Mary Alice Jefferson died intestate in what is now Okmulgee County, Oklahoma, on the 9th day of June, 1905, leaving her surviving the aforesaid husband and children: that on the 4th day of June, 1908, the said Peggy Ann Jefferson died intestate, a resident of and in Okmulgee County, Oklahoma, under age and never having been married, the owner of and seized of the legal and equitable title to the following described tract of land situated in Okmulgee County, Oklahoma, to wit:

The Northeast Quarter of Section 23, Township 15 North, Range 14 East, containing 160 acres, more or less.

The said land came to the said Peggy Ann Jefferson as an inheritance, one half from her father, John J. Jefferson Jr., and one half from her mother, Mary Alice Jefferson, and was allotted to her by the Creek Nation and the United States of America by allotment deeds, copies of which are hereto attached, made a part hereof, and marked Exhibits "A" and "B" respectively.

The plaintiffs say that upon the death of the said Peggy Ann Jefferson, either under the laws of the State of Oklahoma, or
3 under Section 2531 of Chapter 49 of Mansfield's Digest of the laws of the State of Arkansas, which is in part as follows: "In cases where the intestate shall die without descendants, if the estate came by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs;" the title to an undivided one half interest in said land vested in her father, John J. Jefferson, Jr., and the other undivided one half interest vested in her brothers and sisters, Mattie R. Wasson, Grant N. Jefferson, Thurman Jefferson, Rebecca Jefferson, and Willie Noland Jefferson, who survived her.

The plaintiffs say that they are now the owners of an undivided three tenths interest in said land, and that the defendants, Thurman Jefferson and Rebecca Jefferson, are the owners of an undivided two tenths interest in said land; that the defendants, Mary Severs Owens, Bessie E. English, and Annie S. Cook, as the only heirs at law of the said F. B. Severs, deceased, are the owners of a one half undivided interest in and to said land.

The plaintiffs say that Albert Z. English and Wm. J. Cook, as the administrators of the estate of F. B. Severs, deceased, and Mary Severs Owens, Bessie E. English, and Annie S. Cook, as the only

heirs at law of the said F. B. Severs, under a deed of conveyance from John J. Jefferson, Jr., to their ancestor, F. B. Severs, deceased, are in the possession of said property, with the said Beaver Oil & Gas Company, and Prairie Oil & Gas Company, under an oil and gas mining lease from them are in possession of said property and are wrongfully claiming the whole thereof under said deed of conveyance from the said John J. Jefferson Jr., the aforesaid father of Peggy Ann Jefferson. That these plaintiffs are the owners of an undivided three tenths interest in said property, and have been at all times since June 8th, 1908, and that they are entitled to the immediate possession of the same; that the defendants aforesaid
4 heirs and administrators of F. B. Severs, deceased, and the Beaver Oil & Gas Company, and Prairie Oil & Gas Company are now wrongfully withholding the possession of the same from these plaintiffs.

Wherefore, plaintiffs pray judgment of the Court that they are the joint owners of the said three tenths interest in said land, and that they have the possession thereof.

II.

The plaintiffs say that John J. Jefferson and Mary Alice Jefferson, mentioned in the first paragraph hereof, were husband and wife and citizens of the Creek Nation, opposite Roll Numbers 1045 and 1046 respectively; that the plaintiffs Mattie R. Wasson No. 1048, Grant N. Jefferson No. 1049, Peggy Ann Jefferson, No. 1050, Thurman Jefferson, No. 1051, Rebecca Jefferson, No. 1052, Willie Noland Jefferson, No. —, are the children of the said John J. Jefferson, and Mary Alice Jefferson, aforesaid, and that they are also citizens of the Creek Nation, and the sole heirs at law of the said Mary Alice Jefferson.

The plaintiffs say that Mary Alice Jefferson died intestate in what is now Okmulgee County, Oklahoma, on the 9th day of June, 1905, leaving her surviving the aforesaid husband and children. That on the 4th day of June, 1908, the said Peggy Ann Jefferson died intestate, a resident of and in Okmulgee County, Oklahoma, under age and never having been married, the owner of and seized with the legal and equitable title to the following described tract of land, situated in Okmulgee County, Oklahoma, to wit:

The Northeast Quarter of Section 23, Township 15 North, Range 14 East, containing 160 acres, more or less.

5 That said land came to the said Peggy Ann Jefferson as an inheritance, an undivided one half from her father, John J. Jefferson Jr., and an undivided one half from her mother, Mary Alice Jefferson, and was alloted to her by the Creek Nation, and the United States of America by allotment deeds, copies of which are hereto attached and made a part hereof, marked Exhibits "A" and "B" respectively.

The plaintiffs say that upon the death of the said Peggy Ann Jefferson, either under the laws of the State of Oklahoma, or under Section 2531 of Chapter 49 of Mansfield's Digest of the laws of the

State of Arkansas, which is in part as follows: "In cases where the intestate shall die without descendants, if the estate came by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs"; the title to an undivided one half interest in said lands vested in her father, John J. Jefferson, Jr., and the other one half undivided interest vested in her brothers and sisters, Mattie R. Wasson, Grant N. Jefferson, Thurman Jefferson, Rebecca Jefferson, and Willie Noland Jefferson, who survived her.

The plaintiffs say that at all times since June 4th, 1908, that they have been and now are the joint owners of an undivided three tenths interest in and to all of said property.

The plaintiffs say that on the 8th day of June, 1908, John J. Jefferson, by a deed of general warranty, a copy of which is hereto attached and made a part hereof, marked Exhibit "C," attempted to convey said entire tract of land to one F. B. Severs, that the said F. B. Severs is the father of Annie S. Cook, Bessie E. English, and Mary Severs Owens, and that he is now deceased.

The plaintiffs say that the said defendants, Annie S. Cook, Bessie E. English, and Mary Severs Owens, and the Beaver Oil & Gas Company, and the Prairie Oil & Gas Company, under a lease
6 from them claim the whole title to the property hereinabove described by reason of the aforesaid deed to their ancestor, F. B. Severs, from the said John J. Jefferson Jr.; that the claim of the said defendants is without right to a one half undivided interest in said property and to the three tenths undivided interest of these plaintiffs in and to said property; that same is prejudicial to the rights of these plaintiffs; that by reason thereof these plaintiffs are injured and the marketable and salable value of these plaintiffs is material injured and impaired.

The plaintiffs say that they are the owners of a three tenths undivided interest in said land; that there is now oil wells on said property that are producing several hundred barrels of oil daily; that same is in the possession and being operated by the said defendants Beaver Oil & Gas Company, Prarie Oil & Gas Company, Albert Z. English and Wm. J. Cook, as administrators of the estate of F. B. Severs, deceased, Mary Severs Owens, Annie S. Cook, and Bessie E. English, and has so been for more than one year last past. That they are appropriating all the benefits arising therefrom to themselves and converting same to their own use and benefit without the consent of these plaintiffs. That plaintiffs say that since January 1st, 1914, that the said defendants have taken from the said property more than Six Hundred Thousand barrels of oil of the average price of Sixty Cents per barrel: that they have converted same to their own use and benefit and deprived these plaintiffs of their proportionate part thereof and without their consent.

The plaintiffs say that the defendants, Mary Severs Owens, Bessie E. English, and Annie S. Cook are the owners of an undivided one half interest in and to the said property, and that the defendants Thurman Jefferson and Rebecca Jefferson are the owners of an un-

divided two tenths interest in and to said property, and were
7 at all times herein mentioned such owners. That these plaintiffs are entitled to share in the proceeds of said property and in its use and occupancy.

Wherefore, plaintiffs pray judgment of the Court that they be adjudged the owners of an undivided three tenths interest in and to said land; that the deed from said John J. Jefferson Jr., to F. B. Severs be cancelled, and the lease to the Beaver Oil & Gas Company be cancelled set aside and held for naught in so far as it conveys more than an undivided one half interest in said property; that the plaintiffs have an accounting of the defendants for the use and occupancy of said land; that the said defendants be required to pay over to these plaintiffs their proportionate share of the proceeds arising from the use and occupancy thereof; that the title of these plaintiffs in and to said land be quieted against the claims of the said defendants or either of them; that a guardian ad litem be appointed for Thurman Jefferson, and Rebecca Jefferson; for their cost herein and all proper and equitable relief.

JAMES M. HAYS,
Attorney for Plaintiffs.

STATE OF OKLAHOMA,
Okmulgee County, ss:

James M. Hays says that he is attorney for Mattie R. Wasson, and that she is absent from Okmulgee County: that he has read the petition herein and that the statements therein contained are true as he verily believes.

JAMES M. HAYS.

Subscribed and sworn to before me this 7th day of May, 1915.

MABLE ADAMS,
Notary Public.

My Commission Expires February 8th, 1919.

8 *Allotment Deed No. —.*

Creek Freedman Roll No. 1050.

The Muskogee (Creek) Nation, Indian Territory, to all to whom these presents shall come, Greeting:

Whereas, by the act of Congress approved March 1, 1901, (31 Stats. 861), agreement ratified by the Creek Nation May 25, 1901, it was approved that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allot-ed among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen

shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by on behalf of Peggy Ann Jefferson, a citizen of said tribe, as an allotment, exclusive of a forty acre homestead.

Now, therefore, I, the undersigned Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Peggy Ann Jefferson all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the Following described land, viz:

The West Half of the Northeast Quarter, and the Southeast Quarter of the Northeast Quarter of Section twenty-three (23), Township Fifteen (15) North, Range Fourteen (14) East of the Indian Base and Meridian, in Indian Territory, containing One Hundred and Twenty (120) acres, more or less, as the case may be, according to the United States survey thereof subject, however to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902, (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 12th day of March, A. D. 1903.

P. PORTER,
Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior, L. R. S.
Approved April 10th, 1903.
EATHAN ALLEN HITCHCOCK, *Secretary,*
By OLIVER A. PHILLIPS, *Clerk.*

Filed for record on the 17th day of April, 1903, at 2 o'clock P. M. and recordrd in book 9, Page 259.
Exhibit "A."

9 *Homestead Deed No. —.*

Creek Freedman Roll No. 1050.

The Muskogee (Creek) Nation, Indian Territory, to all whom these presents shall come, Greeting:

Whereas, By the act of Congress approved March 1, 1901, (31 Stats. 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, shall be allot-ed among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, it was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment, forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Peggy Ann Jefferson, a citizen of said tribe, as a homestead,

Now, therefore, I, the undersigned Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Peggy Ann Jefferson, all right, title and interest of said Nation in and to the following described land, viz:

The Northeast Quarter of the Northeast Quarter of Section Twenty-three (23) Township Fifteen (15) North, Range Fourteen (14) East

of the Indian Base and Meridian, in Indian Territory, containing Forty (40) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to the provision of said Act of Congress relating to the use, devise and descent of said land after the death of the said Peggy Ann Jefferson; and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation, and to the provisions of the Act of Congress approved June 30, 1902, (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 12th day of March, A. D. 1903.

P. PORTER,
Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior, L. R. S.
Approved April 10th, 1903.
ETHAN ALLEN HITCHCOCK, *Secretary,*
By OLIVER A. PHILLIPS, *Clerk.*

Filed for record on the — day of April, 1903, at — o'clock — M. and recorded in Book — at Page —.

Exhibit "B."

10 *General Warranty Deed.*

This indenture made this 8th day of June, A. D. 1908, between John J. Jefferson, heir at law of Peggy A. Jefferson, Dec'd, of Okmulgee County, State of Oklahoma, of the first part, and F. B. Severs of the second part, witnesseth:

That said party of the first part, in consideration of the sum of Three Thousand Dollars, the receipt of which is hereby acknowl-

edged, does by these present, grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns, all of the following described real estate, situated in the County of Okmulgee, and State of Oklahoma, to wit:

The Northeast Quarter of Section Twenty-three (23), Township Fifteen (15) North, Range Fourteen (14) East, the same being the allotment of Peggy Ann Jefferson, deceased.

To have and to hold the same together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining forever. And said John J. Jefferson for himself and his heirs, executors, or administrators, do hereby covenant, promise and agree, to and with the said party of the second part, that at the delivery of these presents he is lawfully seized in his own right of an absolute and indefeasible estate of inheritance, in fee simple, of, in and to all and singular the above granted and described premises, with the appurtenances; that the same are free clear, discharged and unincumbered of and from all former grants, titles, charges, judgments, taxes, assessments and incumbrances of what nature and kind soever, and that he will warrant and forever defend the same unto the said party of the second part, his heirs and assigns, against said party of the first part, his heirs and all and every person whomsoever lawfully claiming or to claim the same.

In Witness whereof the said party of the first part has hereto set his hand the day and year first above written.

JOHN J. JEFFERSON, JR.

11 STATE OF OKLAHOMA,
Okmulgee County, ss:

Before me, C. J. Shields, a Notary Public in and for said County and State, on this 8th day of June, 1908, personally appeared John J. Jefferson, Jr., and —— —— to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and Seal the day and year above written.

C. J. SHIELDS. [SEAL.]

My commission expires Sep. 27th, 1909.

This instrument was filed for record on the 8th day of June, A. D. 1908, at 4:48 o'clock P. M.

—— ——,
Register of Deeds,
By —— ——,
Deputy.

"Exhibit C."

12 *Petition for the Appointment of Guardian ad Litem.*

In the District Court of Okmulgee County, State of Oklahoma.

No. 3775.

GRANT N. JEFFERSON et al., Plaintiffs,
vs.
WM. J. COOK, ALBERT Z. ENGLISH, Administrator of the Estate F. B. Severs, Deceased, et al., Defendants.

Comes now Thurman Jefferson and Rebecca Jefferson, minors in the above entitled cause, by their attorney, Harlan Read, and respectfully represents and shows to the Court that they are minors under the age of 21 years and 18 years respectfully; that one Write Thornburg is the duly appointed, qualified and acting guardian of the persons and estates, and that they believe that he, the said Write Thornburg, will be a proper person to defend their interest in the above entitled cause, and that he should be appointed guardian ad litem in said cause to represent their interest.

Wherefore, said minors pray that this Court appoint the said Write Thornburg guardian ad litem for the purpose of this suit.

HARLAN READ,
Attorney for Defendants.

13 *Order.*

In the District Court of Okmulgee County, State of Oklahoma.

No. 3775.

GRANT N. JEFFERSON et al., Plaintiffs,
vs.
WM. J. COOK, ALBERT Z. ENGLISH, Administrator of the Estate of F. B. Severs, Deceased, et al., Defendants.

This cause coming on to be heard on this the 21 day of May, 1915, upon the petition of Thurman Jefferson and Rebecca Jefferson, minor defendants herein, for the appointment of Write Thornburg as their guardian ad litem, and the Court being fully advised in the premises,

It is hereby ordered, adjudged and decreed that the said Write Thornburg be, and he is hereby appointed guardian ad litem of said minors.

ERNEST B. HUGHES, *Judge.*

O. K.
H. READ,
Att'y for Defendants.
JAMES M. HAYS,
Att'y for Plaintiff.
2—610

14 *Answer of Defendants, Thurman Jefferson and Rebecca Jefferson.*

In the District Court of Okmulgee County, State of Oklahoma.

No. 3775.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND Jefferson, Who Sues by His Guardian, John J. Jefferson, Jr., Plaintiffs,

vs.

WM. J. COOK and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. Severs, Deceased; Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a Corporation; Beaver Oil & Gas Company, a Corporation; Thurman Jefferson, and Rebecca Jefferson, Defendants.

Comes now the defendants, Thurman Jefferson and Rebecca Jefferson, minors, by their duly appointed guardian ad litem, and for their answer to the petition herein filed, allege and say:

That they admit each and every allegation contained in the plaintiffs petition.

Wherefore, defendants pray judgment that they be declared to be the joint owners of an undivided two-tenths interest in and to the land described in said petition and that they have possession thereof and that the deed from the said John J. Jefferson, Jr., to F. B. Severs be cancelled in so far as it attempts to convey the said two-tenths interest of these defendants; that an accounting be had by the co-defendants for the use and occupancy of said land and that the co-defendants herein be required to pay over to these defendants their proportionate share of the proceeds arising from the use and occupancy of said land; that the title of these answering defendants in and to said land be quieted against the claims of the co-defendants or either of them, and for such other re-
15 lief, including cost of this action, as may seem equitable and just.

HARLAN READ,
Attorney for Defendants, Thurman Jefferson and Rebecca Jefferson.

16 *Demurrer.*

In the District Court of Okmulgee County, State of Oklahoma.

3775.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND Jefferson, Who Sues by His Guardian, John J. Jefferson, Jr., Plaintiffs,

vs.

WM. J. COOK and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. Severs, Deceased; Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Co., a Corporation; Beaver Oil & Gas Co., a Corporation; Thurman Jefferson, and Rebecca Jefferson, Defendants.

Comes now the defendants, Wm. J. Cook and Albert Z. English as administrators of the estate of F. B. Severs, deceased, Mary Severs Owens, Bessie E. English, and Annie S. Cook, by and through their attorney, N. A. Gibson, and demur to the plaintiffs' petition, the first cause of action therein set forth, and for grounds of demurrer says:

First: That the said first alleged cause of action does not state facts sufficient to constitute a cause of action.

Second: That the facts stated in the alleged first cause of action show that the plaintiffs have no interest in the land described.

For further demurrer in their behalf to the second alleged cause of action, defendants say:

First. That the same does not state facts sufficient to constitute a cause of action.

17 Second. That the facts stated and alleged therein show that the plaintiffs have no right, title or interest in the land described.

For further demurrer defendants say:

First. That the plaintiffs' petition, as a whole, does not state facts sufficient to constitution a cause of action.

Second. That the facts and alligations set forth in the plaintiffs' petition show that plaintiffs have no right, title or interest in the land described.

Wherefore, defendants pray judgment.

N. A. GIBSON,
Attorney for Defendants.

18 *Demurrer.*

In the District Court of Okmulgee County, State of Oklahoma.

No. 3775.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND Jefferson, Who Sues by His Guardian, John J. Jefferson, Jr., Plaintiffs,

vs.

WM. J. COOK and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. Severs, Deceased; Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a Corporation; Beaver Oil & Gas —, a Corporation; Thurman Jefferson, and Rebecca Jefferson, Defendants.

Comes now the defendant, Beaver Oil & Gas Company, a corporation, by and through its attorneys, E. R. Perry, and Ramsey & De Meules, and demurs to the plaintiffs' petition, the first cause of action therein set forth, and for grounds of demurrer says:

First. That the said first alleged cause of action does not state facts sufficient to constitute a cause of action.

Second. That the facts stated in the alleged first cause of action show that the plaintiffs have no interest in the land described.

For further demurrer in their behalf to the second alleged cause of action, defendant says:

First. That the same does not state facts sufficient to constitute a cause of action.

Second. That the facts stated and alleged therein show that the plaintiffs have no right, title or interest in the land described.

19 For further demur-er defendant says:

First. That plaintiffs' petition, as a whole, does not state facts sufficient to constitute a cause of action.

Second. That the facts and alligations set forth in the plaintiffs' petition show that plaintiffs have no right, title or interest in the land described.

Wherefore, defendant prays judgment.

GEO. S. RAMSEY,
E. R. PERRY,
EDGAR A. DE MEULS,
Counsel for Defendant Beaver Oil & Gas Company.

20 *Demurrer.*

In the District Court of Okmulgee County, State of Oklahoma.

No. 3775.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND Jefferson, Who Sues by His Guardian, John J. Jefferson, Jr., Plaintiffs,

vs.

WM. J. COOK and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. Severs, Deceased; Mary Severs Owens, Bessie E. English, Annie S. Cook, Prarie Oil & Gas Company, a Corporation; Beaver Oil & Gas Company, a Corporation; Thurman Jefferson, and Rebecca Jefferson, Defendants.

Comes now the defendant, The Prairie Oil & Gas Company, a corporation, and demurs to the Plaintiffs' petition, the first Cause of action therein set forth, and for grounds of demur says:

First. That the said first alleged cause of action does not state facts sufficient to constitute a cause of action.

Second. That the facts stated in the alleged first cause of action show that the plaintiffs have no interest in the land described.

For further demurrer in its behalf to the second alleged cause of action, defendant says:

First. That the same does not state facts sufficient to constitute a cause of action.

Second. That the facts stated and alleged therein show that the plaintiffs have no right, title or interest in the land described.

21 For further demurrer defendant says:

First. That plaintiffs' petition, as a whole, does not state facts sufficient to constitute a cause of action.

Second. That the facts and alligations set forth in the petition of plaintiffs show that plaintiffs have no right, title or interest in the land described.

Wherefore, defendant prays judgment.

W. S. FITZPATRICK,
N. A. GIBSON,
Attorynes for Defendant the Prairie Oil & Gas Company.

22 *Order.*

In the District Court of Okmulgee County, State of Oklahoma.

No. 3775.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND Jefferson, Who Sues by His Guardian, John J. Jefferson, Jr., Plaintiffs,

VS.

WM. J. COOK and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. Severs, Deceased; Mary Severs Owens, Bessie E. English, Annie S. Cook, Prarie Oil & Gas Company, a Corporation; Beaver Oil & Gas Co., a Corporation; Thurman Jefferson, and Rebecca Jefferson, Defendants.

This cause coming on to be heard on this the 8th day of June, 1915, the same being a regular day of the regular term of the District Court of Okmulgee, County, Oklahoma, Hon. E. B. Hughes, Regular Judge, presiding, upon the demurrer of the defendant, Beaver Oil & Gas Company to the Plaintiffs' petition, and the demurrer of Wm. J. Cook, Albert Z. English, Mary Severs Owens, Bessie E. English, and Annie S. Cook, and the demurrer of the Prairie Oil & Gas Company to the plaintiffs' petition, and there appearing for the plaintiffs, James M. Hays, attorney, and there appearing for the defendants, Beaver Oil & Gas Company, E. R. Perry and George S. Ramsey, attorneys, and there appearing for the Prairie Oil & Gas Company, Wm. J. Cook, Albert Z. English, Mary Severs Owens, Bessie E. English, and Annie S. Cook, N. A. Gibson, attorney, and after argument of counsel for and against demurrers, and consideration thereof by the Court, the Court

23 finds that said demurrers should be sustained, and,

It is therefore ordered, adjudged, decreed and considered by the Court that each of the said demurrers of the said defendants be, and the same are hereby sustained, to which ruling and order of the Court the plaintiffs except, and plaintiffs' attorn-y thereupon announced that the plaintiffs elected to stand on their petition and had no amendments to make. Whereupon said defendants moved that final judgment be entered dismissing plaintiffs' case. And on due consideration said motion is sustained and plaintiffs' case is dismissed and all the Costs are taxed to plaintiffs, for which execution will issue. Plaintiffs' motion for a receiver is denied. To all of which rulings plaintiffs excepted.

ERNEST B. HUGHES, *Judge.*

24 *Motion to Advance.*

In the Supreme Court of the State of Oklahoma.

No. 7453.

GRANT N. JEFFERSON, MATTIE R. WASSON, WILLIE NOLAND JEFFERSON, Who Sues by His Guardian, John J. Jefferson, Jr., Plaintiffs in Error,

vs.

WM. J. COOK, ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. Severs, Deceased, Mary Severs Owen, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a Corporation; Beaver Oil & Gas Company, a Corporation; Thurman Jefferson and Rebecca Jefferson, Defendants in Error.

Come now the plaintiffs in error, by their counsel of record, and move the court to advance the above styled cause and assign the same for oral argument, for the following reasons:

1. This case was tried upon a demurrer to the plaintiff's petition. The demurrer was sustained and plaintiffs elected to stand upon their petition, and a final judgment was entered dismissing their case.

The Questions Involved.

The land in controversy in this action is the allotment of a minor Creek Freedman, who, after the death of his mother, died unmarried on June 4th, 1908, and left surviving a father and five brothers and sisters. Did the Arkansas law of descent and distribution as a Statute of the United States or as a contract control the devolution of this allotment, or does the law of descent and distribution of Oklahoma, as a Statute of the United States, control the devolution of this allotment.

25 2. If the Oklahoma law of descent and distribution as a statute of the United States controls the devolution of this allotment, then the facts in this case bring it under subdivisions 2 and 7 of what is known as Wilson's Statutes of the Territory of Oklahoma. The one side contends that the plaintiffs and the defendants Thurman Jefferson and Rebecca Jefferson took an undivided one-half interest in the land, and that the father, the vendor of the defendants, took the other half interest in said land. The other side contends that the father took the whole estate.

These questions are of great public importance and should be adjudicated by this court at an early date.

3. The property is also being operated for oil and gas, and if the plaintiffs have any interest in the property it should be ascertained at an early date, otherwise the value of the land for oil and gas will be greatly depreciated during the pendency of this litigation.

Wherefore, plaintiffs in error pray the Court to advance this case and assign same for oral argument.

Respectfully submitted,

JAMES M. HAYS,
Attorney for Plaintiffs in Error.
HARLAN READ,
Att'y for Defendants Rebecca and Thurman Jefferson.

As counsel for defendants in error we join in the Motion to Advance this case, deeming the questions involved of great public importance. The questions clearly presented by the record are:

First. The allottee being a citizen of the Creek Nation and having died after the admission of Oklahoma, as a State, did the Arkansas law of descent and distribution, or the Oklahoma Law of descent, control the devolution of the allotment?

26 Second. If the Oklahoma law controls, is the doctrine in the Shulthis case announced by the United States Circuit Court of Appeals and the Supreme Court of the United States holding allotments under the Arkansas Law to be ancestral, applicable to the descent of an allotment under paragraphs 7 and 8 of Section 8418 of the Revised Laws of Oklahoma for 1910.

If the Oklahoma Law controls, the facts in this case bring it under paragraphs 7 and 8 of Section 8418 of the Revised Laws of Oklahoma for 1910; the one side contends that the allotment is an inheritance from the parent which is denied by the other side.

These two questions are of great public importance, and should be adjudicated by this court at an early date.

We pray that the court advance this cause and assign it for oral argument on some date other than during the month of August or the 7th of September. On September 7th 1915 we have a case for trial in the United States Court at Muskogee, but any other date will be satisfactory, and we request the court to make an order fixing the time within which plaintiffs in error shall file their brief and allowing defendants in error reasonable time to respond thereto.

Respectfully submitted,

HARLAN READ,
GEO. S. RAMSEY,
N. A. GIBSON,
E. R. PERRY,
EDGAR A. DE MEULES,
M. E. ROSSER,
Counsel for Defendants in Error.

Filed Jul- 20, 1915. William M. Franklin, Clerk.

27 And thereafter, at the July, 1915, Term of said Supreme Court on the 3rd day of August, 1915, the following proceeding was had in said cause, to wit:

7453.

GRANT N. JEFFERSON et al.
vs.
WM. J. COOK et al.

And now on this day it is ordered by the court that the above cause be advanced and set for hearing at the October 1915 term of court.

28 *Petition in Error.*

Filed June 18, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 7453.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND Jefferson, Who Sues by His Guardian, John J. Jefferson, Jr., Plaintiffs,

vs.

WM. J. COOKE and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. Severs, Deceased; Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Co., a Corporation; Beaver Oil & Gas Co., a Corporation; Thurman Jefferson, and Rebecca Jefferson, Defendants.

The said plaintiffs in error complain of said defendants in error for that said defendants in error, The Prairie Oil & Gas Company, The Beaver Oil & Gas Company, Wm. J. Cook and Albert Z. English, administrators of the estate of F. B. Severs, deceased. Annie S. Cook, Bessie E. English, and Mary Severs Owens, and each of them, at the June Term of the District Court of Okmulgee County, State of Okahoma, on the 8th day of June 1915, recovered a judgment by the consideration of the Court, against the plaintiffs in error in a certain action then pending in said Court wherein the said plaintiffs in error were plaintiffs, and the said defendants in error were defendants.

The original transcript, duly certified and attested, is hereto attached, marked Exhibit "A" and made a part of this petition in error, and the said plaintiffs in error aver that there is error
29 in the said record and proceedings prejudicial to their rights in this, to-wit:

First. Because the Court sustained the demurrer of the Prairie Oil & Gas Company, the demurrer of the Beaver Oil & Gas Company, and the demurrer of the defendants Wm. J. Cook, administrators, et al., to the petition of the plaintiffs.

Second. Because the Court erred in not overruling the demurrer

of the Prairie Oil & Gas Company, the Beaver Oil & Gas Company, and Wm. J. Cook et al.

Third. Because the decision of the Court is contrary to law.

Fourth. Because the Court denied plaintiff's motion for Receiver.

Wherefore, the plaintiffs in error pray that said judgment so rendered be reversed, set aside and held for naught, and that a judgment may be rendered in favor of these plaintiffs in error and against the defendants in error and that the rights of these plaintiffs in error lost by the reason of the rendition of said judgment be restored and for such other relief as to the court may seem just and proper.

JAMES M. HAYS,
Attorney for Plaintiffs in Error.

30 In the Supreme Court of the State of Oklahoma.

No. 7453.

GRANT N. JEFFERSON et al., Plaintiffs in Error,
vs.
WILLIAM J. COOK et al., Defendants in Error.

Comes now the plaintiffs in error above named and moves this court to appoint a receiver for the property involved in this controversy, and to take charge and manage, and receive, the proceeds arising from the operation of said property from oil and gas.

1. Because the said plaintiffs in error are the owners of the legal and equitable title to three-tenths undivided interest in said property, and together with their defendants in error, Thurman Jefferson and Rebecca Jefferson, own a one-half undivided interest in said property, and the legal and equitable title thereto.

2. Because the said property is being operated by the defendants in error, Prairie Oil & Gas Company, the Beaver Oil & Gas Co., and William J. Cook and Albert Z. English as administrators of the estate of F. B. Severs, deceased, and Mary Severs Owens, Bessie E. English and Annie S. Cook, to the exclusion of these plaintiffs in error and the defendants in error, Thurman Jefferson and Rebecca Jefferson, and the said defendants in error are appropriating for oil and gas the proceeds of the said oil and gas to their own use and benefit, and are reducing the value of the said property materially to the injury of the plaintiffs.

30½ 3. That the said defendants in error are taking daily from said property three or four hundred barrels of oil and are refusing to allow these plaintiffs in error any right thereto, as more fully appears from the record in this case to which reference is made herein.

Wherefore the plaintiffs in error pray the court to appoint a receiver to receive the proceeds of said property and to hold the same subject to the order of this court and to supervise and see that the

property is properly operated and managed so as the rights of all the plaintiffs in error may be properly protected.

JAMES M. HAYS,
Attorney for Plaintiffs in Error.

Service of Notice.

Notice of the foregoing motion is hereby accepted.

GEO. S. RAMSEY.
E. R. PERRY.
N. A. GIBSON.

Filed Oct. 12 1915. William M. Franklin, Clerk.

31 And thereafter, at the January, 1916, Term, of said Supreme Court, on the 8th day of February, 1916, the following proceeding was had in said cause, to wit:

7453.

G. N. JEFFERSON et al.
vs.
W. J. COOK et al.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed, and application for receiver dismissed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed, and application for appointment of receiver is dismissed.

Opinion by Turner, J. All the Justices concur.

32 Filed Feb. 8, 1916. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 7453.

GRANT N. JEFFERSON, MATTIE R. WASSON et al., Plaintiffs in Error,
vs.
WM. J. COOK et al., Defendants in Error.

1. On June 4, 1908, a duly enrolled Creek Freedman died intestate after receiving her allotment leaving her surviving no issue or husband or mother; leaving her surviving her father and brothers and sisters, all duly enrolled Creek Freedman, Held, that the Enabling Act Sections 13 and 21 and the Constitution Article 25,

Section 2 in effect repealed that part of Section 6 of the Supplemental Agreement (Act June 30, 1902) providing that "The descent and distribution of land and money provided for by an Act of Congress approved March 1, 1901, shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas" and substituted therefor the laws of the Territory of Oklahoma thus extended to and put in force throughout the State; leaving in force the two provisions contained in Section 6 which survive and operate as such upon the laws extended to the extent of limiting the same so that "only Citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation," and, "that if there be no person of Creek citizenship to take the descent and distribution of said estate then the inderitance shall go to non-citizen heirs in the order named in the Laws of the State of Oklahoma."

2. Rev. Laws 1910, Sec. 8416, 8417, 8418, construed and Held that, as intestate left no issue or husband or mother, the father takes the estate to the exclusion of the brothers and sisters and that the seventh subdivision of the latter Section has no bearing on the case.

(Syllabus by the Court.)

Error from the District Court of Okmulgee County.

Ernest B. Hughes, Judge.

Affirmed.

James M. Hays, Attorney for Plaintiffs in Error.

George S. Ramsey, E. R. Perry, N. A. Gibson, Edgar A. de Meules, and Malcolm E. Rosser, Attorneys for Defendants in Error.

33 *Opinion of the Court.*

By TURNER, *J.*:

On May 7, 1915, Grant N. Jefferson and Mattie R. Wasson, for themselves, and Willie Noland Jefferson by his guardian, John J. Jefferson, Jr., sued William J. Cook and Albert Z. English, as administrators of the estate of F. B. Severs, deceased, and others, in the District Court of Okmulgee County.

The material facts admitted by the demurrer to the petition are that John J. Jefferson, Jr., and one Mary Alice Jefferson were, on June 9, 1905, husband and wife and were duly enrolled Freedmen of the Creek Nation. On that day Mary Alice Jefferson died leaving her surviving her husband John J. Jefferson Jr., and, as her only heirs at law their children, the plaintiffs, Grant N. Jefferson, Mattie R. Wasson and Willie Noland Jefferson, and defendants, Thurman Jefferson and Rebecca Jefferson; also Peggy Ann Jefferson, all duly enrolled Citizens of said Nation. On June 4, 1908, Peggy Ann Jefferson died intestate, a resident of said County, nu-

married, a minor without issue and the owner of an allotment in the Creek Nation described in the petition; leaving her surviving her Father, John J. Jefferson Jr., and the plaintiffs Grant N. Jefferson, Mattie R. Wasson, and Willie Noland Jefferson, and the defendants Thurman Jefferson and Rebecca Jefferson. Thereafter the father conveyed the land to F. B. Severs from whom spring up the chain of conveyances which is alleged to be a cloud on plaintiffs' title, and which they seek to set aside. In the petition plaintiffs set up their title thus:

"The plaintiffs say that upon the death of the said Peggy Ann Jefferson, either under the laws of the State of Oklahoma, or under Section 2531 of Chapter 49 of Mansfield's Digest of the Laws of the State of Arkansas, which is in part as follows: 'In all cases where the intestate shall die without discendants, if the estate came by the father then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs.' The title to an undiveded one-half interest in said land vested in her father, John J.
34 Jefferson Jr., and the other undivided one-half interest vested in her brothers and sisters, Mattie R. Wasson, Grant N. Jefferson, Thurman Jefferson, Rebecca Jefferson, and Willie Noland Jefferson who survived her.

"The plaintiffs say that at all times since June 4, 1908, that they have been and are now the joint owners of an undivided three-tenths interest in and to all of said property."

In sustaining a demurrer to their petition the Court, in effect, held that they had no interest in the land and that the father took title to the allotment as the sole heir of Peggy Ann under the laws of descent and distribution of the State (Rev. Laws 1910, Sec. 8416 et seq.). Counsel for plaintiffs contend that in this he erred because, they say, that, in as much as this allotment was, as stated in the deed conveying to Peggy Ann both her homestead and surplus, made in pursuance of and subject to the terms of both the Original (Act March 1, 1901,) and Supplemental Agreements (Act June 30, 1902), the Arkansas Law of descent and distribution constituted a contract between Peggie Ann and the United States and the Creek Nation and thus became a vested right in her which, on descent, cast, sent the land one-half to the father and the other to her brothers and sisters, as directed by Section 6 of the Supplemental Agreement, which reads:

"The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861) in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said Act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory; provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; and provided further, that if there be no person of Creek Citizenship to take the descent and distribution of said estate, then the

inheritance shall go to non-citizen heirs in the order named in said Chapter 29."

It is sufficient to say of this contention that the agreements referred to are not contracts but Acts of Congress subject to repeal by Congress at any time. In Gritts v. Fisher, 224 U. S. 640, 648, the Court speaking of the Cherokee Agreement of 1902 said:

"The difficulty with the appellant's contention is that it treats the Act of 1902 as a contract, when 'it is only an Act of Congress and can have no greater effect.' "

35 See also Red Bird v. United States, 203 U. S. 76-93, 51 L. ed., 96, where such was again expressly held. Such was, in effect, our holding in Brady v. Sizemore et al., 33 Okla., 169-173. There we said:

"What we would hold if, prior to the ratification of said Supplemental Agreement and the consequent operation of said Section 6, which in terms repealed the provisions of the Original Agreement in so far as the same provided for descent and distribution of the Creek Nation and substituted therefor the laws of descent and distribution contained in Chapter 49 of Mansfield's Digest of Arkansas, rights have vested in virtue of the part of the Act repealed, we need not state. It is sufficient to say that no such question is here presented, and, no rights have thus accrued. Congress, prior thereto, had a right to change the legislative intent and make other provision regarding those allotments, which it did by enacting Section 6, changing the course of their devolution, and provide, in effect, as it did the laws of Arkansas should thereto apply instead of the laws of the Creek Nation.

Sizemore et al. v. Brady, 235 U. S., 441, Cooley on Constitutional Law 512.

If it were necessary to cite additional authority to support this view we might call attention to the fact that as Section 6 of the Supplemental Agreement expressly repeals that part of the Original Agreement in so far as it provides for descent and distribution according to the laws of the Creek Nation, Congress thereby placed a legislative construction on the former Act in keeping with what we have just held.

Whether the Court erred in sustaining the demurrer to plaintiffs' petition turns upon the question of what effect the Enabling Act, Section 13 and 21 and the Constitution Article 25, Section 2 had upon said Section 6. And in order to determine whether the Enabling Act, which was general legislation, repealed said Section in whole or in part and substituted therefor the laws of descent and distribution of the Territory of Oklahoma extended to and put in force throughout the State when erected, it is necessary to first determine which part, if any, of said Section is general and which is special legislation; for it is as to the former only that the Enabling Act works a repeal leaving uneffected such special legislation

36 as may be contained in said Section. And first let us see what led up to the enactment of Section 6. Prior to Act of May 2, 1890, the Creeks maintained their own tribal government in

that part of the State then known as the Creek Nation. They had their own laws, which were administered in their tribal Courts and among them laws governing the descent and distribution of property belonging to their citizens dying intestate. Then along came said Act which by Section- 30 and 31 extended over and put in force in the Indian Territory certain general laws of Arkansas and among them Chapter 49 of Mansfield's Digest of 1884, which pertained to descent and distribution, with the proviso that:

"The judicial tribunals of the Indian Nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the Nation by nativity or by adoption shall be the only parties; and as to all such cases, the laws of the State of Arkansas extended over and put in force in said Indian Territory by this act shall not apply."

But the operation of this proviso was much restricted when Congress by the Act of June 7, 1897, provided: "that the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race," and was, in effect, rendered inoperative when the Act of June 28, 1898, abolished all tribal Courts in Indian Territory and in Section 26 of the Act provided that "the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the Courts of the United States in the Indian Territory." All of which had the effect to displace the Creek tribal laws of descent and distribution and to put in force in that jurisdiction as a general law upon the statute books, applicable alike to all persons and estates, the *the* Arkansas law of descent and distribution contained in Chapter 49 aforesaid. But to one familiar with the history of those times, it is known that the Creeks were adverse to allotment; that they clung tenaciously
37 to their laws, and were especially anxious that their lands, when allot-ed and descent cast, should not be inherited by a stranger. This feeling was so strong when the Original Agreement of March 1, 1901, was entered into between certain representatives on the part of the United States, and certain representatives on the part of the Creek Nation that there was provided in Section 7 thereof, that after the homestead of an intestate allottee had served its purpose, the land should descend to his heirs according to the laws of descent and distribution of the Creek Nation, and in Section 28 that, if a Citizen of the Nation or a child entitled to allotment as such should die before receiving his or her share of the funds of the tribe, the land and money to which he would be entitled, if living, should also descend. In thus deferring to the desires of this dependent people it would seem that Congress, from out the general laws of descent and distribution in force in Indian Territory, made an exception of the Creek and his alloted lands by thus placing upon the statute books special legislation in effect that, in case of intestates, upon descent cast, those lands should descend according to the laws of descent and distribution of the Creek Nation.

We also know from the history of those times that, as the Creek law of descent and distribution thus put in force, when originally enacted by the Creeks, was intended to govern the distribution of

personal property only, the same was not of easy application to govern the devolution of real estate, and for that reason the legislative mind soon thereafter changed and reverted to the laws of Arkansas as best adapted to meet the situation; that this change soon found expression in Section 6 of the Supplemental Agreement, which by general legislation repealed that part of the Original Agreement which put in force the Creek law of descent and distribution
38 and again provided that the laws of Arkansas should govern the devolution of those allotments; and again deferred to the desires of the Creeks by adding thereto, in the way of special legislation, the two provisos appearing in said Section giving to Creek Citizens, male and female, and their descendants, a preferred right to the inheritance.

We say that part of Section 6 which put in force Chapter 49 of Mansfield's Digest, was general legislation for the reason that, standing alone, its effect was to extend that Chapter in its operation so as to embrace all persons and estates in Indian Territory and thereby bring the Creeks and their allotted land within the general law of descent and distribution then in force in that jurisdiction.

And Washington v. Miller, 235 U. S. 422, in effect so holds, and also that the two provisos to that Section are special legislation. In so holding the Court was discussing the question of whether said two provisos were repealed by a provision of the Act of April 28, 1904 (33 Stat. L, 573), which reads:

"All laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said Territory, whether Indian, Freedmen, or otherwise."

And which, in effect, was contended, attempted to do what Section 6, without the provisos later accomplished, as we have seen. In passing, the Court, in effect, held, as said Act was general legislation, it did not repeal the two provisos for the reason that they were special legislation. Referring to said provision, the Court said:

"No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication? There is no doubt that, if taken literally, it would subject the Creek lands to the Arkansas law of descent and distribution without any qualification or restriction. But this would be only by reason of the generality of its terms, for it makes no mention of that law or of those lands. In short, it was plainly a general statute, and did not show that the attention of Congress was then particularly directed to the descent of lands of the Creeks. On the other hand, Section 6 of the Supplemental Agreement and its two provisos dealt with that subject in *a* specific and positive terms which made it certain that the Creeks and their
39 lands were particularly in mind at the time. In these circumstances we think there is no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such a irreconcilable conflict between the earlier and later statutes that effect cannot reasonably be given to both. (United States v. Healey, 160 U. S. 136, 147, 40 L. ed. 369, 373; 16 Sup. Ct. Rep. 247, United States v. Greathouse, 166 U. S. 601, 605, 41 L. ed.

1130, 1131, 17 Sup. Ct. Rep. 701); Second, where there are two statutes upon the same subject, the earlier being special and the latter general, the presumption is, in the absence of an express repeal, or in absolute incompatibility, that the special statute is intended to remain in force as an exception to the general (Townsen v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357; Ex Parte Crow Dog (Ex. Parte Kaug Gi-Shin-Ga), 109 U. S. 556, 570, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396; Rogers v. United States, 185 U. S. 83, 87, 89, 46 L. ed. 816, 819, 22 Sup. Ct. Rep. 582); and third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized.

"No doubt there was a purpose to extend the operation of the Arkansas law in various ways, but we think it was not intended that they should supersede or displace special statutory provisions enacted by Congress with particular regard for the Indians, whose affairs were peculiarly within its control. Taylor v. Parker, 235, U. S. 42, ante, 22, 35 Sup. Ct. Rep. 22, see also 32 Okla. 209, 122 Pac. 547."

Now, while it is readily seen that the Enabling Act worked a repeal of that part of Section 6 which says that the descent and distribution of the lands and moneys provided for in the Original Agreement shall be in accordance with Chapter 49 of Mansfield's Digest of the laws of Arkansas (for the reason that the Act and that part of the Section are both general legislation) and substituted therefor the laws of descent and distribution of Oklahoma Territory; in as much as the Miller case holds that the Act of April 28, 1904, supra, did not repeal the two provisos to that Section, we cannot hold that the Enabling Act worked that result and substituted for Chapter 49 and the two provisos the laws of descent and distribution of the Territory, as we are ask- to do. Rather are we of the opinion that the Enabling Act, Section 13, Which provides:

"That all laws in force in the Territory of Oklahoma, as for as applicable, shall extend over and apply to said State until changed by the legislature thereof."

and Section 21, which provides:

"And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout the State except as modified or changed by this Act or by the Constitution of the State."

and Constitution Article 25, Section 2, which provides:

"All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended and remain in force in the State of Oklahoma until they expire by their own limitation, or are altered or repealed by law."

substituted for the laws of descent and distribution contained in Chapter 49 of Mansfield's Digest (as directed to apply in Section 6)

the laws of descent and distribution of the Territory of Oklahoma and left remaining in force as an exception thereto the two provisos in question which survive and operate as such so far as applicable upon the laws of the Territory thus put in force throughout the State. For, while we entertain no doubt that the purpose of Congress, as expressed in the Enabling Act, was to extend the Territorial laws of descent and distribution throughout the State, we do not think it was the intent of either Congress or the State to extend them further than to displace the local law on that subject, as contained in Mansfield's Digest, Chapter 49, and directed to apply by Section 6 and certainly not to supersede special legislation by Congress pertaining to the Indian "whose affairs were peculiarily within its control". And so, we repeat, the Enabling Act and the Constitution substituted for the laws of descent and distribution contained in forty nine (49) of Mansfield's Digest, directed to apply by Sec. 6, the laws of the Territory on that subject and left remaining in force as an exception thereto the provisos in question to survive and operate as such upon the laws of the Territory of Oklahoma thus extended; and that too, for another reason, Section 6 of the Supplemental Agreement, and the laws of descent and distribu-
41 tion of the Territory thus put in force throughout the State were both Acts of Congress and in pari materia. When such is the case the rule of construction is as laid down by us in Ratliff v. Fleener et al., 43 Okla. 652, where, quoting approvingly from 36 Cyc. 1147, we said:

"Statutes in pari materia are those which relate to the same person or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law."

Which means that those Acts should be construed as one act and that both should stand so far as they are consistent with each other. Thus construed, the same result would follow, that is, the laws of descent and distribution contained in Chapter 49 of Mansfield's Digest, directed to apply by section 6, would be superseded by the laws of descent and distribution of the Territory, thus extended to and put in force throughout the State, with the provisos in question surviving and operating thereupon as such to the extent of limiting that law as extended so that "only citizens of the Creek Nation, male and female, and their Creek descendents shall inherit lands of the Creek Nation."

And, "That if there be no person of Creek Citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizens' heirs in the order named in the laws of the State of Oklahoma".

This is no novalty in construction. In the Ratliff case, supra, whether a peremptory writ of mandamus should run requiring the election board to place the name of plaintiff on the official ballot for election to be held November 3, 1914, as a candidate for the office of the Register of Deeds, turned upon a proper construction

of an act approved May 1, 1913, and an Act approved May 19, 1913, both passed at the same session of the legislature and both relating to the consolidation of offices. In that case the Acts being
42 in pari materia, we said they must be construed together as one act; that the function of a proviso was to limit the language preceding it and that Section one of the latter act should operate as a proviso on Section 5 of the former act so as to read as set forth in the opinion.

No contention being made that the laws of descent and distribution in force in the Territory of Oklahoma on the advent of Statehood are inapplicable to the devolution of Creek allotments or that they have been changed by the Constitution or are repugnant thereto, it follows that they were extended to and put in force throughout the State at that time, operated upon by said provisos, as stated, and, being in force at the time descent cast, govern the devolution of this allotment. But all parties in interest being Creeks, we will deal no further with said provisos.

Rev. Laws 1910, provides:

"8416. Succession is the coming in of another to take the property of one who dies without disposing of it by will.

"8417. The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the County Court, and to the possession of any administrator appointed by that court for the purpose of administration.

"8418. When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be destributed in the following manner: If decedent leaves no issue, nor husband nor wife, the estate must go to the father or mother, or if he leaves both father and mother, to them in equal shares."

from which we learn that as intestate left no issue or husband or mother, the father takes the estate and the plaintiffs being brothers and sisters of deceased take no title thereto or share therein, and that the court was right in sustaining the demurrer to the petition. There is no merit in the contention that the seventh Sub-division of this section is the law applicable to the devolution of this estate. It reads:

"If the decedent leaves several children, or one child and the issue of one or more children, and any surviving child dies
43 under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent, descends in equal shares to the other children of the same parent, and to the issue of any such children who are dead, by right of representation."

This for the reason that it is not true, as contended, that Peggy Ann inherited this allotment one half from her father, John J. Jefferson Jr., and one half from her mother, Mary Alice Jefferson. While heretofore we may have indulged in fiction in construing the laws governing the devolution of Creek Allotments, we have not

gone so far as to hold that one can inherit from the living. And such we would do if we would here hold that this allottee, who received deeds to her allotment April 10, 1903, and filed them of record April 17, 1903, inherited any part of the land in controversy from her mother who died June 9, 1905, or any part from her father who is still living. And if we should so hold it might be difficult to say why the moiety thereof inherited from the mother should not be chargeable with the payment of the mother's debts in the hands of the administrator. And there is nothing in the case of Shulthis v. McDougal, 170 Fed. 529, or any other case that we know of which would justify such holding. It is contended that this case held Creek Allotments to be ancestral estates, and it follows that this allotment was derived by inheritance from the father and mother of Peggy Ann. Not so. To be sure, the case holds the allotment to be a birth-right and comes to the allottee by the blood of his or her tribal parent or parents, as the case may be, but that case far from holds that it comes thus by inheritance, but on the contrary, does hold: "The lands of that tribe fit into neither of the classes mentioned in the statute (reference being made to an ancestral estate and new acquisition). They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase." But why refine on the character
44 of this estate to determine whether it is ancestral or not? In our view of the statute under construction, such is unnecessary. The statute is clear. Sec. 8418, supra, reads:

"When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner:"

Which means that when any person shall die intestate having title to any estate or any kind of an estate, no matter how acquired—whether by descent or purchase, or whether it is ancestral or a new acquisition—not otherwise limited etc., if deceased leaves no issue, nor husband or wife, the estate must go to the father etc.

As counsel for plaintiff fails to point out where in the Act of Congress of May 28, 1908, there is an express declaration by Congress that it had not, prior to that date, either by the Enabling Act or by the Constitution of the State subjected the lands and property of the Indians to the laws of descent and distribution of the Territory of Oklahoma, and we can find no such declaration therein contained, we lay that Act out of this case, especially as counsel on neither side claim any rights under that act or that the same in any way effects the devolution of this estate.

As we are of the opinion that the father, John J. Jefferson Jr., inherited the entire allotment to the exclusion of the brothers and sisters of the deceased allottee, and that the Court did right in sustaining the demur-er to the petition, the judgment of the trial Court is affirmed, and the application for the appointment of a receiver is dismissed.

All the Justices concur.

45 *Petition of Plaintiffs Grant N. Jefferson, Mattie R. Wasson, Willie Noland Jefferson, by His Guardian, John J. Jefferson, Jr., and Defendants in Error Thurman Jefferson and Rebecca Jefferson for Rehearing.*

In the Supreme Court of the State of Oklahoma.

No. 7453.

GRANT N. JEFFERSON, MATTIE R. WASSON et al., Plaintiffs in Error,
vs.
WM. J. COOK et al., Defendants in Error.

May it please the Court: With the profoundest respect for the opinion of this Court, we earnestly insist that Sec. 6 of the Supplemental Creek Agreement, Act of Congress, June 30, 1902, as follows:

"The provisions of the Act of Congress approved March 1, 1901, (31 Stat. L. 861) in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said Act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory; provided, that only Citizens of the Creek Nation, male and female, and their Creek descendents shall inherit lands from the Creek Nation; and provided further, that if there be no person of Creek Citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49."

should not be changed to read as follows:

"The provisions of the Act of Congress approved March 1, 1901, (31 Stat. L. 861) in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said Act shall be in accordanc- with the laws of the State of Oklahoma; provided, that only citizens of the Creek Nation, male and female, and their Creek Descendents shall inherit lands of the Creek Nation; and provided further, that if there be no person of Creek Citizenship to take the descent and distribution of said estate. then the inheritance shall go to non-citizen heirs in the order named in the laws of the State of Oklahoma."

46 Because Congress of the United States in passing the Enabling Act and the amendments thereto of the State of Oklahoma was without jurisdiction to pass a law of descent and distribution for the Citizens of the State of Oklahoma as it was without jurisdiction to pass a law fixing the State Capital thereof of said State. The people of the State of Oklahoma, in adopting their Constitution, *was* without authority and jurisdiction to pass

a law repealing or amending the Act of Congress of June 30, 1902, or any other Act of Congress. And in this instance, it is not one where two negatives can combine and make one affirmative. For the reason indicated hereinabove and for those set out in our brief for plaintiffs in error which the Court seems to have overlooked and failed to take into consideration we think the opinion herein rendered on the 8th day of February, 1916, is erroneous.

(2.)

The opinion in the case of Gritts v. Fisher, 224 U. S., 640 to 648 speaks of the agreement between the United States and the Cherokee Nation as an act of Congress relating to tribal land of the Cherokee Nation, and it is not applicable when speaking as do the plaintiffs in error about a patent issued and signed by the government of the United States and the Creek Nation to a third party a Creek Citizen in relation to that Creek Citizen in individual and private property in which the said Act of Congress is one of the terms of a contract embraced in said patent. We insist that the allotment, and the Act of allot-ing as stated in Woodward v. de Graffenfried, and cited in the reply brief of the plaintiff in error, "includes the designation of the beneficiary in case of the death of an allottee."

The case of Choate v. Trapp, cited in the brief of the plaintiffs in error, rather than that of Gritts v. Fisher is applicable
47 to the contract insisted upon by the plaintiffs in error, and these petitioners.

(3.)

It may be that an Indian Allotment is not an "ancestral estate," but if it is and would pass under the condition existing in this case under the law of the State of Arkansas, one half to the brothers and sisters and the other half to the father, then when the identical condition existed in the Oklahoma law, and Sec. 7 thereof, then it seems to us that it should go to the heirs and the identical one- that it would under the laws of the State of Arkansas.

We think that there are errors in the opinion of the Court, which after a consideration of the suggestions herein above, may appear to the Court.

Respectfully submitted,

JAMES M. HAYS,
Attorney for Plaintiffs in Error and Defendants in Error Thurman Jefferson and Rebecca Jefferson.

Filed Feb. 16, 1916. William M. Franklin, Clerk.

48 And thereafter, at the January, 1916, Term of said Supreme Court, on the 14th day of March, 1916, the following proceeding was had in said cause, to wit:

7453.

G. N. JEFFERSON et al.
vs.
W. J. Cook et al.

And now on this day it is ordered by the court that the petition for rehearing filed herein be, and the same is hereby denied.

49 *Petition for Writ of Error from Supreme Court of the United States to the Supreme Court of the State of Oklahoma.*

Filed Apr. 13, 1916. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 7453.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND Jefferson, Who Sues by His Guardian, John J. Jefferson, Jr., Plaintiffs in Error,

vs.

WM. J. COOK and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. Severs, Deceased; Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a Corporation; Beaver Oil & Gas Company, a Corporation; Thurman Jefferson, and Rebecca Jefferson, Defendants in Error.

To the Honorable Matthew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma:

The plaintiffs in error in the above styled cause, here respectfully present:

First. That heretofore, said plaintiffs in error instituted their suit against said defendants in error, in the District Court of Okmulgee County, State of Oklahoma, for the recovery of three-tenths of the Northeast Quarter of Section Twenty-three (23), Township Fifteen (15) North, and Range Fourteen (14) East, comprising one hundred and sixty acres situated in said Okmulgee County, and for an accounting of the rents, issues and profits arising therefrom from and ever after June 8, 1908, including a large production of oil since said date taken from said lands by said defendants in error and appropriated to their own use and benefit:

Second. That in the petition of plaintiffs in error filed in said cause, it is there shown, among other things, that said lands so involved therein was the allotment of one Peggie Ann Jefferson, who was a Freedman and a member of the Creek Tribe of Indians or Nation and was duly enrolled as a member of said tribe or
50 Nation opposite No. 1050; that said lands were allotted and patented to the said Peggie Ann Jefferson under and by reason

of an Act of Congress, approved March 1, 1901, and ratified by said Creek Nation May 25, 1901, known as the Original Creek Agreement, and another Act of Congress approved June 30, 1902, known as the Creek Supplemental Agreement, for which patents were duly issued, as provided in said Acts, to the said Peggie Ann Jefferson, on March 12, 1903, and were approved by the Secretary on April 10, 1903, and were duly recorded, as provided in said Acts and were then delivered to the said Peggie Ann Jefferson in her lifetime, all of which is shown and established by said patents, copies of which were filed with said petition as parts thereof as exhibits "A" and "B," and which said matters were specially set up and claimed by plaintiffs in error in said petition, so filed in said District Court; that it was further set up and claimed in said petition that John J. Jefferson and Mary Alice Jefferson were husband and wife and citizens of said Creek Nation, so enrolled opposite No. 1045 and 1046 respectively; that the plaintiffs in error, Mattie R. Wasson, was enrolled opposite No. 1048, and Grant N. Jefferson, opposite No. 1049, Peggie Ann Jefferson, opposite No. 1050, said Thurmand Jefferson, opposite No. 1051, said Rebecca Jefferson, opposite No. 1052, and said Willie Nolan Jefferson, opposite No. —, and are the children of the said John J. Jefferson and Mary Alice Jefferson, and are also citizens of said Creek Nation, and the sole heirs at law of the said Mary Alice Jefferson, who died intestate in what is now said Okmulgee County, June 9, 1905, leaving her surviving the aforesaid husband and children; that on June 4, 1908, the said Peggie Ann Jefferson died intestate, a resident of said Okmulgee County, under age and never having been married, and was seized and possessed of said lands, so allotted to her at the time of her death;

Third. That in said petition, so filed in said District Court, plaintiffs in error further state and set up and claimed:

"That said land came to the said Peggy Ann Jefferson as an inheritance, an undivided one half from her father, John J. Jefferson, Jr., and an undivided one half from her mother, Mary Alice Jefferson, and was allotted to her by the Creek Nation, and the United States of America by allotment deeds, copies of which are hereto attached and made a part hereof, marked Exhibits "A" and "B" respectively.

51 The plaintiffs say that upon the death of the said Peggy Ann Jefferson, either under the laws of the State of Oklahoma, or under Section 2531 of Chapter 49 of Mansfield's Digest of the laws of the State of Arkansas, which is in part as follows:

"In case where the intestate shall die without descendants, if the estate came by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs";

the title to an undivided one half interest in said lands vested in her father, John J. Jefferson, Jr., and the other one half undivided interest vested in her brothers and sisters, Mattie R. Wasson, Grant N.

Jefferson, Rebecca Jefferson, and Willie Noland Jefferson, who survived her."

"The plaintiffs say that all times since June 4th, 1908, that they have been and are now the joint owners of an undivided three tenths interest in and to all of said property."

Fourth. That in said petition it is also alleged that on June 8, 1908, said John J. Jefferson, Jr., by warranty deed, a copy of which was therewith filed as exhibit "C," attempted to convey said entire tract of land to one F. B. Severs; that said Severs was the father of said Annie S. Cook, Bessie E. English, and Mary Severs Owens, and is now deceased; that said Cook, English and Owens and Beaver Oil & Gas Company and The Prairie Oil & Gas Company, under a lease from them, claim the whole title to said lands by reason of said deed to said E. B. Severs from said John J. Jefferson, Jr.; that the claim of said defendants is without right to a one half undivided interest in said lands and to the three tenths undivided interest of said plaintiffs thereto, etc.;

Fifth. Said petition further alleges that there were oil wells on said property producing several hundred barrels of oil daily, and were in the possession and under operation by said defendants in error and had been so operated for more than one year past; that said defendants in error were appropriating all the benefits arising therefrom to themselves and converting the same to their own use and benefit without the consent of these plaintiffs; that, since January 1, 1914, said defendants in error, excepting said Thurman and Rebecca Jefferson, had taken from said property more than Six Hundred Thousand barrels of oil of the average price of sixty cents per barrel and have converted the same to their own use and benefit and had
52 deprived the plaintiffs below of their proportionate part thereof and without their consent; that said Mary Severs Owens, Bessie E. English and Annie S. Cook are the owners of an undivided one half interest in and to said property, and the defendant, Thurman Jefferson and Rebecca Jefferson, are the owners of an undivided two tenths interest in said property, and the plaintiffs below to three tenths thereof, and entitled to share in the proceeds of said property and its use and occupancy, etc.;

Sixth. That in said petition said plaintiffs below prayed judgment of said District Court:

"* * * That they be adjudged the owners of an undivided three tenths interest in and to said land; that the deed from said John J. Jefferson J-., to F. B. Severs be cancelled, and the lease to the Beaver Oil & Gas Company be cancelled set aside and held for naught in so far that it conveyes more than an undivided one half interest in and to the said property; that the plaintiffs have an accounting of the defendants for the use and occupancy of said land; that the said defendants be required to pay over to these plaintiffs their proportionate share of the proceeds arising from the use and occupancy thereof; that the title of these plaintiffs in and to said land be quieted against the claims of the said defendants or either of them; that a guardian ad litem be appointed for Thurman Jefferson, and Rebecca Jefferson; for their cost herein and all proper and equitable relief."

Seventh. That a guardian ad litem was appointed by said District Court for said Thurman and Rebecca Jefferson and thereafter an answer for said minors was filed in said cause, joining in the prayer of said plaintiffs below; but said other defendants in error interposed their demurrers to said petition, to the effect that said petition did not state facts sufficient to constitute a cause of action on behalf of said plaintiffs, and that the facts so stated therein did not entitle said plaintiffs to any relief therein or to show that said plaintiffs had any right, title or interest in said property; that said cause came on to be heard upon said demurrers before said District Court on June 8, 1915, and were by said District Court sustained to which ruling of the court said plaintiffs duly excepted, and declined to plead further and elected to stand on said petition etc.; whereupon defendants moved that final judgment be entered dismissing said cause, and said motion was sustained and said cause dismissed at the cost of the plaintiffs and the plaintiff's motion for a receiver was
53 denied, to all of which said rulings the plaintiffs below again excepted, as shown by said judgment of said District Court;

Eighth. That from said judgment of said District Court, an appeal was taken and perfected by the plaintiffs in error, who were the plaintiffs therein in said District Court, to the Supreme Court of the State of Oklahoma, which is the highest court of said state, which has jurisdiction of said matters, and said cause came on to be finally heard and decided by said Supreme Court on February 8, 1916, whereupon said Supreme Court affirmed said judgment of said District Court, and dismissed the application of the plaintiffs in error for the appointment of a receiver therein; that on February 16, 1916, the plaintiffs in error filed their petition before said Supreme Court for a rehearing in said cause under the rules of said court, and said petition for a re-hearing came on for hearing before said Supreme Court on March 14, 1916, and was by said Supreme Court denied, whereupon said plaintiffs in error now apply for a writ of error from the Supreme Court of the United States to said Supreme Court of said State, for the purpose of having said judgment and decision of said State Supreme Court reviewed and considered and reversed by said Supreme Court of the United States;

Ninth. That by said decision in said cause upon the facts therein stated and the law arising therein, said State Supreme Court, in the Syllabi therein, held:

"1. On June 4, 1908, a duly enrolled Creek Freedman died intestate after receiving her allotment leaving her surviving no issue or husband or mother; leaving her surviving her father and brothers and sisters, all duly enrolled Creek Freedmen, Held, that the Enabling Act Sections 13 and 21 and the Constitution Article 25, Section 2 in effect repealed that part of Section 6 of the Supplemental Agreement (Act, June 30, 1902) providing that "The descent and distribution of land and money provided for by an Act of Congress approved March 1, 1901, shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas" and substituted therefor the laws of the Territory of Oklahoma thus extended to and put in force throughout the State; leaving in force the two provisions

contained in Section 6 which survive and operate as such upon the laws extended to the extent of limiting the same so that "only Citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation", and, "that if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in" the laws of the State of Oklahoma.

54 2. Rev. Laws 1910, Sec. 8416, 8417, 8418, construed and Held that, as intestate left no issue or husband or mother, the father takes the estate to the exclusion of the brothers and sisters and that the seventh subdivision of the latter Section has no bearing on the case."

Considering themselves aggrieved by said final decision of the Supreme Court of said State of Oklahoma, in affirming said judgment of said District Court, and in rendering judgment against the plaintiffs in error in the above entitled and numbered cause, said plaintiffs in error, herewith presenting their assignments of error herein with this petition, hereby pray a writ of error, from said decision and judgment to the Supreme Court of the United States, the allowance thereof and an order fixing the amount of a cost bond herein, as provided by law in such cases. This 13 day of April, 1916.

LEWIS C. LAWSON,
Holdenville, Oklahoma;
JAMES M. HAYS,
Okmulgee, Oklahoma.
JOHN T. HAYS,
Hobart, Oklahoma,
Counsel for Plaintiffs in Error.

55 *Assignment of Errors and Prayer.*

Filed Apr. 13, 1916. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 7453.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND Jefferson, who Sues by His Guardian, John J. Jefferson, Jr., Plaintiffs in Error,

vs.

WM. J. COOK and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. Severs, Deceased; Mary Severs Owens, Bessie E. English, Annie E. Cook, Prairie Oil & Gas Company, a Corporation; Beaver Oil & Gas Company, a Corporation; Thurman Jefferson, and Rebecca Jefferson, Defendants in Error.

Come now the plaintiffs in error and file herewith their petition for a writ of error, and say that there are errors in the record and pro-

ceedings of the above entitled case, and for the purpose of having the same reviewed and reversed in the Supreme Court of the United States, make the following assignment:

The Supreme Court of the State of Oklahoma erred in holding and deciding:

"1st." That the Enabling Act Sections 13 and 21 and the Constitution Article 25, Section 2 in effect repealed that part of Section 6 of the Supplemental Agreement (Act, June 30, 1902) providing that "The descent and distribution of land and money provided for by an Act of Congress approved March 1, 1901, shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas" and substituted therefor the laws of the Territory of Oklahoma thus extended to and put in force throughout the State; leaving in force the two provisions contained in Section 6 which survive and operate as such upon the laws extended to the extent of limiting the same so that "only Citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation", and, "that if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in "the Laws of the State of Oklahoma," as shown in the first point of the syllabus in said decision;

2nd. That "Rev. Laws 1910, Sec. 8416, 8417, 8418," applied to this case; and in holding and deciding that under said sections and Revised Laws, "as intestate left no issue or husband or mother, the father takes the estate to the exclusion of the brothers and sisters and that the seventh subdivision of the latter section has no bearing in the case,"

as so held by said Supreme Court in the second point of the
56 syllabus in this case;

3rd. That in so holding and deciding that section 6 of said Supplemental Creek Agreement, except the provisos therein, was repealed by sections 13 and 21 of the Enabling Act, and section 2 of Article 25 of the State Constitution; and that the same repealed that part of the second proviso, providing that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49, and substituted therefor "the laws of the State of Oklahoma"; and by holding and deciding that sections 8416, 8417 and 8418, of the Revised Laws of Oklahoma, 1910, alone applied to and governed the estate of said Peggie Ann Jefferson, the plaintiffs in error were thereby deprived of, and denied, all their rights, title, interest and estate in and to the lands in controversy in this case, contrary to, and in violation of said Acts of Congress, namely, the Original Creek Agreement, approved March 1, 1901, and the Supplemental Creek Agreement, approved June 30, 1902, specially set up and mentioned in the petition of the plaintiffs in error and therein shown in exhibits "A" and "B", and passed upon and construed by said State Supreme Court in its said judgment and decision; and in so holding that said sections 8416, 8417 and 8418

of said Revised Laws of Oklahoma, 1910, alone applied to and governed the devolution of the title to said lands, and in failing and refusing to hold said lands as an ancestral estate in the hands of said Peggie Ann Jefferson under and by reason of said Acts of Congress and under the laws of descent of Oklahoma Territory, as they existed at the time of the admission of said state into the Union on November 16, 1907, said plaintiffs in error were also denied all their right, title and interest in and to said lands, contrary to said Acts of Congress, and contrary to said laws of descent of said Oklahoma Territory and the State of Oklahoma, which were specially set up and claimed by the plaintiffs in error in their petition, filed in said cause in the District Court of Okmulgee County, State of Oklahoma.

The errors of said State Supreme Court in its judgment and decision in this case, are more specifically and particularly set forth as follows:

57 Said Supreme Court of Oklahoma in its decision in said case erred in holding and deciding—

First. "That the Enabling Act Sections 13 and 21 and the Constitution Article 25, Section 2 in effect repealed that part of Section 6 of the Supplemental Agreement (Act, June 30, 1902) providing that" the descent and distribution of land and money provided for by an Act of Congress approved March 1, 1901, shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas" and substituted therefor the laws of the Territory of Oklahoma thus extended to and put in force throughout the state";

Second. In holding and deciding that said sections of said Enabling Act and the Constitution of said State repealed all of said Section 6 of said Creek Supplemental Agreement except the provisos therein;

Third. In holding and deciding that that provision of the second proviso in said section 6 of said Supplemental Agreement which provides "That if they be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in said chapter 49," was also repealed by said sections of said Enabling Act and the Constitution of said State and substituted for "said chapter 49" therein provided in said section 6, "the laws of the State of Oklahoma";

Fourth. In holding and deciding that sections 8416, 8417 and 8418 of the Revised Laws of Oklahoma, 1910, applied in this case and governed the devolution of the title to the lands in controversy upon the death of said Peggie Ann Jefferson, which occurred June 4, 1908, which was prior to the time the Act of Congress of May 27, 1908, or the Revised Laws of Oklahoma, 1910, took effect, or became the law in said State, and were not applicable to the lands in controversy in this case;

Fifth. In holding and deciding in this case, in effect, that
58 upon the death of said Peggie Ann Jefferson on June 4, 1908, her father, John J. Jefferson, Jr., took and inherited said lands to the entire exclusion of the plaintiffs in error and said defendants in error, Thurman Jefferson and Rebecca Jefferson, the brothers and sisters of said decedent, and in decreeing said lands to said other

defendants in error, under and by reason of said deed, so executed to F. B. Severs by said John J. Jefferson Jr. on June 8, 1908;

Sixth. By holding and deciding that all of said section 6 of said Creek Supplemental Agreement, except said provisos, was general legislation of Congress, and was repealed by implication by said Enabling Act, leaving said provisos as special legislation of Congress and therefore not repealed by said Enabling Act, except as to said second proviso, as above indicated, and applicable to such estates under the laws of descent of Oklahoma;

Seventh. In holding and deciding in this particular case, where the title to said lands had already vested under and by reason of said Original and Supplemental Creek Agreements and in accordance with their terms, provisions and conditions in said agreements made and contained, that said agreements were not contracts, but were simply Acts of Congress, subject to repeal by Congress at any time, and had no legal force or effect in this case, and under which the plaintiffs in error and their father and mother had no rights or interests, specially set up and claimed in the petition of the plaintiffs in error in this case and shown by exhibits "A" and "B" attached thereto as conclusive evidence of such vested rights;

Eighth. In holding and deciding that this allotment involved in this case, was governed by said sections 8416, 8417 and 8418 of said Revised Laws of Oklahoma, 1910, "no matter how acquired—whether by descent or purchase, or whether it is ancestral or a new acquisition," and thereby denying to the plaintiffs in error all their right title and interest in and to said lands contrary to said Acts of Congress and contrary to the laws of descent of Oklahoma Territory therein held to have been put in force by the Enabling Act, and
59 therefore, an act of Congress itself, wherein said laws of descent of Oklahoma Territory have provisions for the disposition of ancestral estates as well as new acquisitions whose provisions and legal effect were thereby also denied to these plaintiffs in error by said exclusive application of said sections 8416, 8417 and 8418 of said Revised Laws of Oklahoma, 1910, contrary to the terms and provisions of said laws of descent of said Territory even if the same have any application to this case or may be held to have been put in force in said state of Oklahoma by said Enabling Act and made applicable to the members of the Five Civilized Tribes and their property, after said state was admitted into the Union.

Wherefore, plaintiffs in error pray that said judgment and decision of the Supreme Court of the State of Oklahoma, dated February 8, 1916, be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by reason of said judgment and decree, and that judgment herein be rendered in favor of the plaintiffs in error and for their costs herein expended.

LEWIS C. LAWSON,
Holdenville, Oklahoma,
JAMES M. HAYS,
Okmulgee, Okla.,
JOHN T. HAYS,
Hobart, Okla.,
Counsel for Plaintiffs in Error.

60 Filed Apr. 13, 1916. William M. Franklin, Clerk.

Allowance of the Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma.

No. 7453.

The above entitled matter coming on to be heard before me upon the petition of said plaintiffs in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma and upon the assignments of error therein, and upon the examination thereof and the record in said matter therewith presented, and desiring to give said plaintiffs in error an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matters.

It is, therefore, ordered that a writ of error therein be, and the same is hereby, allowed to said Supreme Court of said State from the Supreme Court of the United States, and that a cost bond therein be and the same is hereby fixed at the sum of $500.00, to be given by said plaintiffs in error, or one or more of them, with surety and all other provisions and conditions provided by law in such cases.

This 13 day of April, 1916.

[Seal Supreme Court, State of Oklahoma.]

MATTHEW J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

Filed March —, 1916. —— ——, Clerk.

61 Filed Apr. 14, 1916. William M. Franklin, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Grant N. Jefferson, Mattie R. Wasson, and Willie Noland Jefferson, who sues by his guardian, John J. Jefferson, Jr., as plaintiffs in error, and Wm. J. Cook and Albert Z. English, as administrators of the estate of F. B. Severs, Deceased, Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil &

Gas Company, a Corporation, Beaver Oil & Gas Company, a corporation, Thurman Jefferson, and Rebecca Jefferson, as defendants in error wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construc-
62 tion of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was aginst the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Grant N. Jefferson, Mattie R. Wasson, and Willie Noland Jefferson, who sues by his guardian, John J. Jefferson, Jr. as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 13th day of April, in the year of our Lord one thousand nine hundred and sixteen.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the United States District Court for the Western District of the State of Oklahoma.

Allowed by:
MATTHEW J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

63 Know all men by these presents, That we, Grant N. Jefferson as Principal and E. W. Kimberly and N. D. Boyd, as sureties, are held and firmly bound unto Wm. J. Cook and Albert Z. English, as administrators of the estate of F. B. Severs, deceased, Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a corporation, Beaver Oil & Gas Company, a corporation, Thurman Jefferson, and Rebecca Jefferson in the full and just sum of Five Hundred ($500.00) dollars, to be paid to the said

Wm. J. Cook and Albert Z. English, as administrators of the estate of F. B. Severs, deceased, Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a corporation, Beaver Oil & Gas Company, a corporation, Thurman Jefferson, and Rebecca Jefferson certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 13th day of April, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a recent term of the Supreme Court of the State of Oklahoma in a suit depending in said Court, between Grant N. Jefferson, Mattie R. Wasson and Willie Noland Jefferson, who sues by his guardian, John J. Jefferson, Jr., as plaintiffs in error, and Wm. J. Cook, and Albert Z. English, as administrators of the estate of F. B. Severs, deceased, Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a corporation, Beaver Oil & Gas Company, a corporation, Thurman Jefferson, and Rebecca Jefferson, as defendants in error, a judgment or decree therein was rendered against the said Grant N. Jefferson, Mattie R. Wasson and Willie Noland Jefferson, who sues by his guardian, John J. Jefferson, Jr., and the said Grant N. Jefferson, Mattie R. Wasson and Willie Noland Jefferson, who sues by his guardian,
64 John J. Jefferson, Jr., having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the said decision in the aforesaid suit, and a citation directed to the said Wm. J. Cook and Albert Z. English, as administrators of the estate of F. B. Severs, deceased, Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a corporation, Beaver Oil & Gas Company, a Corporation, Thurman Jefferson and Rebecca Jefferson citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Grant N. Jefferson, Mattie R. Wasson, and Willie Noland Jefferson, who sues by his guardian, John J. Jefferson, Jr., shall prosecute said writ of error to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

GRANT N. JEFFERSON. [SEAL.]
E. W. KIMBLEY. [SEAL.]
N. D. BOYD. [SEAL.]

Sealed and delivered in presence of
CHAS. L. PHILLY.
HAZEL SHEEDY.

Approved by
MATTHEW J. KANE,
Chief Justice of the
Supreme Court of the State of Oklahoma.

6—610

STATE OF OKLAHOMA,
Okmulgee County, ss:

E. W. Kimbley and N. D. Boyd, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Oklahoma, and know the contents of the foregoing instrument to which we have attached our names. Each for himself says we are worth the sum of Five Hundred Dollars ($500.00) over and above all debts, liabilities and exemptions.

E. W. KIMBLEY.
N. D. BOYD.

Subscribed and sworn to before me by said E. W. Kimbley and N. D. Boyd in my said county and state on this the 12th day of April, 1916.

[SEAL.]

HAZEL SHEEDY,
Notary Public in and for said Okmulgee County, State of Oklahoma.

My commission expires July 12, 1919.

Filed Apr. 13, 1916. William M. Franklin, Clerk.

65 Filed May 6, 1916. William M. Franklin, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Wm. J. Cook and Albert Z. English, as administrators of the estate of F. B. Severs, deceased; Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a Corporation; Beaver Oil & Gas Company, a Corporation; Thurman Jefferson, and Rebecca Jefferson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of State of Oklahoma wherein Grant N. Jefferson, Mattie R. Wasson, and Willie Noland Jefferson, who sues by his guardian, John J. Jefferson, Jr., are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Matthew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma this 13th day of April, in the year of our Lord one thousand nine hundred and sixteen.

MATTHEW J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

P. A. M. Hoodenpyl of Okmulgee is hereby designated a proper person to serve this citation.

MATTHEW J. KANE,
Chief Justice Su. Ct. Okla.

On this 5th day of May, in the year of our Lord one thousand nine hundred and Sixteen, personally appeared P. A. M. Hoodenpyl before me, the subscriber, to the return of service of this Citation hereon and makes oath that he delivered a true copy of the within citation to N. A. Gibson, attorney for Wm. J. Cook et al., on the 26th day of April 1916; to George S. Ramsey, attorney for Beaver Oil & Gas Company, a corporation, on May the 1st, 1916; to Harlen Read, attorney for Thurman and Rebecca Jefferson, on May the 3rd, 1916, as shown by return.

Sworn to and subscribed the 5th day of May, A. D. 1916.

[Seal of Hazel Sheedy, Notary Public, Okmulgee County, Oklahoma.]

HAZEL SHEEDY,
Notary Public.

My commission expires July 12, 1919.

Muskogee, Okla., May 1, 1916.

Service of within citation this day acknowledged on behalf of Beaver Oil & Gas Company.

GEO. S. RAMSEY,
E. R. PERRY,
Att'ys for Beaver Oil & Gas Co.

Return of Service.

I served the within and foregoing Citation by delivering a true copy thereof to N. A. Gibson, attorney for Wm. J. Cook, and Albert Z. English, as administrators of F. S. Severs, deceased, Mary Severs Owens, Beesie E. English, Annie S. Cook, and the Pra-rie Oil & Gas Company, a corporation on the 26th day of April 1916; to George S. Ramsey, attorney for Beaver Oil & Gas Company, a corporation, on May the 1st, 1916; to Harlen Read, attorney for Thurman and Rebecca Jefferson, on May the 3rd, 1916.

P. A. M. HOODENPYL.

66 *Præcipe for Record for the Supreme Court of the United States.*

Filed Apr. 13, 1916. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 7453.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND Jefferson, Who Sues by His Guardian, John J. Jefferson, Jr., Plaintiffs in Error,

vs.

WM. J. COOK and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. Severs, Deceased; Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a Corporation; Beaver Oil & Gas Company, a Corporation; Thurman Jefferson, and Rebecca Jefferson, Defendants in Error.

To the Clerk of the Supreme Court of the State of Oklahoma:

You are hereby requested by the plaintiffs in error to make a transcript of the record in the above styled suit to be printed and filed in the Supreme Court of the United States to which said case is now being taken on writ of error from the decision of said Supreme Court of said State, and to include in said transcript of record the following and no other papers and matters:

1st. The petition of the plaintiffs in error; and exhibits;

2nd. The petition for the appointment of Guardian Ad Litem for the minor defendants, Thurman and Rebecca Jefferson;

3rd. The order of the District Court appointing Write Thornburg as such guardian;

4th. Answer of said minors by said guardian;

5th. Demurrer of William Cook, Albert Z. English, Mary Severs Owens, Bessie E. English and Annie S. Cook, by N. A. Gibson, their counsel;

6th. Demurrer of Beaver Oil & Gas Company by Ramsey and others, its counsel;

7. Demurrer of the Prairie Oil & Gas Company, by Fitzpatrick and Gibson, as counsel;

8th. Order or judgment of the District Court on said demurrers of June 1915;

B. Motion to advance and Order advancing.

9th. Petition in Error of plaintiffs in error and exhibits thereto;

B. Motion for receiver.

10th. Decision and opinion of the Supreme Court of Oklahoma;

67 11th. Motion of plaintiffs in error for a rehearing;

12th. Order of Supreme Court denying said rehearing;

13th. Petition for writ of error to the Supreme Court of the United States;
14th. Allowance of said writ of error;
15th. Writ of error from said Supreme Court;
16th. Assignment of errors;
7th. Bond on said writ of error;
18th. Præcipe for record; the items 13 to 17 inclusive above, are simply to be attached to the record, as provided by law in such cases.

This the 20th Day of March, 1916.

JAMES M. HAYS,
JOHN T. HAYS,
LEWIS C. LAWSON,
Counsel for Plaintiffs in Error.

We, the undersigned counsel of record for the defendants in error in the foregoing case, do hereby acknowledge the receipt of the foregoing designation of parts of the record in said case necessary for the consideration of the error assigned by said plaintiff in error by the Supreme Court of the United States to which said case is now being taken by writ of error, and hereby waive the designation of any other part or parts of the record therein, and agree that the above designation includes all of the portions of said record material or necessary for the consideration of the errors assigned, this the day and date above given.

N. A. GIBSON,
GIBSON & HULL,
Counsel for Defendants in Error William J. Cook and Albert Z. English, as Administrators of the Estate of F. B. Severs, Dec.; Mary Severs Owens, Bessie E. English, Annie S. Cook, and The Prairie Oil & Gas Company.
HARLAN READ,
Counsel for Defendants in Error Thurman Jefferson, Rebecca Jefferson, and Write Thornburg, Their Guardian ad Litem.
E. R. PERRY,
GEO. S. RAMSEY,
Counsel for Defendant in Error Beaver Oil & Gas Company.

68 *Certificate of Clerk.*

In the Supreme Court of the State of Oklahoma.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing pages numbered from 1 to 67, both inclusive, contain a full, true and complete transcript of the record as requested in the precipe filed herein, and at-

tached hereto, in case number 7453, Grant N. Jefferson, Mattie R. Wasson, and Willie Noland Jefferson, who sues by his guardian, John J. Jefferson Jr., Plaintiffs in error, versus Wm. J. Cook and Albert Z. English as administrators of the estate of F. B. Severs, deceased, Mary Severs Owens, Bessie E. English, Annie S. Cook, Prairie Oil & Gas Company, a corporation, Beaver Oil & Gas Company, a corporation, Thurman Jefferson, and Rebecca Jefferson, Defendants in error, as the same remains of record and on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said Court, at Oklahoma City, this 6th day of May, 1916.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

Endorsed on cover: File No. 25,440. Oklahoma Supreme Court. Term No. 610. Grant N. Jefferson, Mattie R. Wasson, and Willie Noland Jefferson, who sues by his guardian, John J. Jefferson, Jr., plaintiffs in error, vs. Wm. J. Cook and Albert Z. English, as administrators of the estate of F. B. Severs, deceased, et al. Filed August 14th, 1916. File No. 25,440.

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In the

Supreme Court of the United States

October Term, 1916.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND JEFFERSON, Who Sues by His Guardian, JOHN J. JEFFERSON, JR.,
Plaintiffs in Error,

vs.

WILLIAM J. COOK and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. SEVERS, Deceased, ET AL.,
Defendants in Error.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

No. 610.

STATEMENT OF THE CASE.

1.

May It Please the Court:

John J. Jefferson, Jr., and Mary Alice Jefferson were husband and wife, duly enrolled Creek citizens, the father and mother of the plaintiffs in error Grant N. Jefferson, Mattie R. Wasson and Willie Nolan Jefferson, the defendants in error Thurman Jefferson, Rebecca Jefferson, and Peggy Ann Jefferson, a minor Creek citizen, who died in infancy on June 4th, 1908. Each and all of said children were and are duly enrolled Creek citizens.

The defendants in error Mary Severs Owens, Bessie E. English and Anna S. Cook are the children and only heirs at law of F. B. Severs, deceased, whose administrators are Albert Z. English and William J. Cook. The Beaver Oil and Gas Company, a corporation, the Prairie Oil and Gas Company, a corporation, lessees of said heirs and administrators.

This suit involves the title and heirship to the following described tract of land, situated in Okmulgee county, Oklahoma, to-wit: The northeast quarter of section (23), township (15) north, range (14) east, containing 160 acres, more or less. Said land was allotted to Peggy Ann Jefferson, deceased, by allotment deeds dated the 12th day of March, 1903, and approved April 10, 1903.

Peggy Ann Jefferson died intestate, a resident of and in Okmulgee county, Oklahoma, under age, never having been married, without issue, the owner of and seized of the legal and equitable title to said land, on June 4th, 1908.

Mary Alice Jefferson, mother of the said Peggy Ann Jefferson, died intestate in what is now Okmulgee county, Oklahoma, on the 9th day of June, 1905, leaving her surviving the aforesaid husband and children.

And as a further statement we quote from the petition, filed on May 7th, 1915, by the plaintiffs in error in the District Court of Okmulgee County, Oklahoma, as follows:

> "That said land came to the said Peggy Ann Jefferson as an inheritance, one-half from her father, John J. Jefferson, Jr., and one-half from her mother, Mary Alice Jefferson, and was allotted to her by the Creek Nation and the United States of America by allotment deeds, copies of which are hereto attached, made a part hereof and marked Exhibits 'A' and 'B' respectively.
>
> The plaintiffs say that upon the death of the said Peggy Ann Jefferson, either under the laws of the State of Oklahoma, or under Section 2531 of Chapter 49 of Mansfield's Digest of the Laws of the State of Arkansas, which is in part as follows:
>
> 'In cases where the intestate shall die without descendants, if the estate came by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs.'

The title to an undivided one-half interest in said land vested in her father, John J. Jefferson, Jr., and the other undivided one-half interest vested in her brothers and sisters, Mattie R. Wasson, Grant N. Jefferson, Rebecca Jefferson, Thurman Jefferson and Willie Noland Jefferson, who survived her.

The plaintiffs say that they are now the owners of an undivided three-tenths interest in said land; that the defendants Thurman Jefferson and Rebecca Jefferson are the owners of an undivided two-tenths interest in said land; that the defendants Mary Severs Owens, Bessie E. English and Annie S. Cook, as the only heirs at law of the said F. B. Severs, deceased, are the owners of a one-half undivided interest in and to said land.

The plaintiffs say that Albert Z. English and William J. Cook, as the administrators of the estate of F. B. Severs, deceased, and Mary Severs Owens, Bessie E. English and Annie S. Cook, as the only heirs at law of the said F. B. Severs, under a deed of conveyance from John J. Jefferson, Jr., to their ancestor, F. B. Severs, deceased, are in the possession of said property with the said Beaver Oil and Gas Company and Prairie Oil and Gas Company under an oil and gas mining lease from them, are in the possession of said property and are wrongfully claiming the whole thereof under said deed of conveyance from the said John J. Jefferson, Jr., the aforesaid father of Peggy Ann Jefferson. That these plaintiffs are the owners of an undivided three-tenths interest in said property and have been at all times since June 4th, 1908; that they are entitled to the immediate possession of the same; that the defendants aforesaid, heirs and administrators of F. B. Severs, deceased, and the Beaver Oil and Gas Company and Prairie Oil and Gas Company are now wrongfully withholding the possession of the same from these plaintiffs."

From the second paragraph of the said petition after like allegation of heirship and ownership set out in the first paragraph hereof, which we omit, as a further statement we quote:

"That the said defendants Annie S. Cook, Bessie E. English and Mary Severs Owens and the Beaver Oil and Gas Company and Prairie Oil and Gas Company, under a lease from them claim the whole title to the property herein above described by reason of the aforesaid deed to their ancestor F. B. Severs from the said John J. Jefferson, Jr.; that the claim of said defendants is without right to a one-half undivided inter-

est in said property and to the three-tenths undivided interest of these plaintiffs in and to said property; that same is prejudicial to the rights of these plaintiffs; that by reason thereof these plaintiffs are injured and the marketable and saleable value of these plaintiffs is materially injured and impaired.

The plaintiffs say that they are the owners of the three-tenths undivided interest in said land; that there is now oil wells on said property that are producing several hundred barrels of oil daily; that same is in the possession and being operated by the said defendants Beaver Oil and Gas Company, Prairie Oil and Gas Company, Albert Z. English, William J. Cook, as administrators of the estate of F. B. Severs, deceased, Mary Severs Owens, Annie S. Cook and Bessie E. English, and has so been for more than one year last past; that they are appropriating all the benefit arising therefrom to themselves and converting the same to their own use and benefit without the consent of these plaintiffs; that plaintiffs say that since January the 1st, 1914, that the said defendants have taken from said property more than six hundred thousand barrels of oil of the average price of sixty cents per barrel; that they have converted same to their own use and benefit and deprived these plaintiffs of their proportionate part thereof and without their consent.

The plaintiffs ask to be adjudged the owners of an undivided three-tenths of said land; that the deed from John J. Jefferson, Jr., to F. B. Severs be canceled; that the plaintiffs have an accounting; that the defendants be required to pay over to the plaintiffs their appropriate share of the proceeds arising from the use and occupancy thereof; that the title of plaintiffs to said land be quieted against the claims of the defendants." (Record, pp. 1 to 5 inclusive.)

Exhibit "A."

Allotment Deed No. —.

Creek Freedman Roll No. 1050.

The Muskogee (Creek) Nation, Indian Territory, to all whom these presents shall come, Greetings:

Whereas, By the Act of Congress, approved March 1, 1901 (31 Stats. 861), agreement ratified by the Creek Nation May

25, 1901, it was approved that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by on behalf of Peggy Ann Jefferson, a citizen of said tribe, as an allotment, exclusive of a forty acre homestead.

Now, therefore, I, the undersigned Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Peggy Ann Jefferson all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz.:

The West Half of the Northeast Quarter, and the Southeast Quarter of the Northeast Quarter of Section Twenty-three (23), Township Fifteen (15) North, Range Fourteen (14) East, of the Indian Base and Meridian, in Indian Territory, containing One Hundred and Twenty (120) acres, more or less, as the case may be, according to the United States survey thereof subject, however, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the

Great Seal of said Nation to be affixed this 12th day of March, A. D. 1903.

P. PORTER,
Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior, L. R. S.
Approved April 10th, 1903.
ETHAN ALLEN HITCHCOCK, *Secretary.*
By OLIVER A. PHILLIPS, *Clerk.*

Filed for record on the 17th day of April, 1903, at 2 o'clock p. m. and recorded in Book 9, Page 259. (Record 5 and 6.)

Exhibit "B."

Homestead Deed No. ——.
Creek Freedman Roll No. 1050.

The Muskogee (Creek) Nation, Indian Territory, to all whom these presents shall come, Greeting:

Whereas, By the Act of Congress, approved March 1, 1901 (31 Stats. 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in the Indian Territory, except as therein provided, shall be allotted among the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, it was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment, forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes or its lawful successor, has certified that the land hereinafter described has been slected by or on behalf of Peggy Ann Jefferson, a citizen of said tribe, as a homestead.

Now, therefore, I, the undersigned Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority

vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Peggy Ann Jefferson all right, title and interest of said Nation in and to the following described land, viz.:

The Northeast Quarter of the Northeast Quarter of Section Twenty-three (23), Township Fifteen (15) North, Range Fourteen (14) East, of the Indian Base and Meridian, in Indian Territory, containing forty (40) acres more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to the provision of said Act of Congress relating to the use, devise and descent of said land after the death of the said Peggy Ann Jefferson; and subject also to all provisions of said Act of Congress relating to appraisement and valuation, and to the provision of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 12th day of March, A. D. 1903.

P. PORTER,
Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior, L. R. S.
Approved April 10th, 1903.
ETHAN ALLEN HITCHCOCK, *Secretary.*
By OLIVER A. PHILLIPS, *Clerk.*

Filed for record on the —— day of April, 1903, at —— o'clock — M. (Record 6-7.)

Exhibit "C."

This exhibit is a general warranty deed dated and acknowledged on the 8th day of June, 1908, from John J. Jefferson, Jr., heir

at law of Peggy A. Jefferson, deceased, to F. B. Severs conveying the land in controversy in this action. (Record 7-8.)

On the 21st day of May, 1915, the District Court of Okmulgee County, Oklahoma, made an order appointing Wright Thornburg guardian *ad litem* for the minor defendants Thurman Jefferson and Rebecca Jefferson. (Record 9.)

Answer.

Thereafter and on the —— day of June, 1915, Thurman Jefferson and Rebecca Jefferson, minors, by their duly appointed guardian *ad litem* filed answer in which they admit each and every allegation contained in plaintiff's petition and prayed that they be adjudged as joint owners of an undivided two-tenths interest in the land described in the petition and that they have possession of same and they prayed for all the relief as to their interest asked by the plaintiffs in their petition. (Record 10.)

Demurrer.

On the 22 day of May, 1915, the defendant Beaver Oil and Gas Company filed demurrer to plaintiffs' petition and each paragraph thereof, from which we quote:

> "First: That the said first alleged cause of action does not state facts sufficient to constitute a cause of action.
>
> Second: That the facts stated in the alleged first cause of action show that the plaintiffs have no interest in the land described."

For further demurrer in their behalf in the second alleged cause of action defendants say:

> "First: That the same does not state facts sufficient to constitute a cause of action.
>
> Second: That the facts stated and alleged therein show that the plaintiffs have no right, title or interest in the land described."

For further demurrer defendants say:

"First: That plaintiffs' petition, as a whole, does not state facts sufficient to constitute a cause of action.

Second: That the facts and allegations set forth in the plaintiffs' petition show that plaintiffs have no right, title or interest in the land described.

Wherefore defendants pray judgment." (Record 12.)

Demurrer.

On the 25th day of May, 1915, the defendants William C. Cook and Albert Z. English as the administrators of F. B. Severs deceased, Mary Severs Owens, Bessie E. English and Anna S. Cook filed their demurrer to the plaintiffs' petition, from which we quote:

"First: That the said first cause of action does not state fact sufficient to constitute a cause of action.

Second: That facts stated in the alleged first cause of action show that the plaintiffs have no interest in the land described."

For further demurrer in their behalf to the second alleged cause of action, defendants say:

"First: That the same does not state facts sufficient to constitute a cause of action.

Second: That the facts stated and alleged therein show that the plaintiffs have no right, title or interest in the land described."

For further demurrer defendants say:

"First: That the plaintiffs' petition, as a whole, does not state facts sufficient to constitute a cause of action.

Second: That the facts and allegations set forth in plaintiffs' petition show that plaintiffs have no right, title or interest in the land described.

Wherefore defendants pray judgment." (Record 11.)

Demurrer.

On May 28th, 1915, the defendant Prairie Oil and Gas Company filed its demurrer to the petition of plaintiffs, from which we quote:

> "First: That the said first alleged cause of action does not state facts sufficient to constitute a cause of action.
>
> Second: That the facts stated in the alleged first cause of action show that the plaintiffs have no interest in the land described."

For further demurrer in its behalf to the second alleged cause of action, defendants say:

> "First: That the same does not state facts sufficient to constitute a cause of action.
>
> Second: That facts stated and alleged therein show that the plaintiffs have no right, title or interest in the land described."

For further demurrer defendants say:

> "First: That plaintiffs' petition, as a whole, does not state facts sufficient to constitute a cause of action.
>
> Second: That the facts and allegations set forth in the petition of plaintiffs show that plaintiffs have no right, title or interest in the land described.
>
> Wherefore defendants pray judgment."

Order.

On the 8th day of June, 1915, the defendants presented their several demurrers, which were by the court sustained. From the order sustaining same we quote:

> "This cause coming on to be heard on this 8th day of June, 1915, the same being a regular day of the regular term of the District Court of Okmulgee County, Oklahoma, Honorable E. B. Hughes, regular judge, presiding, upon the demurrer of the defendant Beaver Oil and Gas Company to the plaintiffs' petition, and the demurrer of Wm. J. Cook, Albert Z. English, Mary Severs Owens, Bessie E. English, and Annie S. Cook, and the demurrer of the Prairie Oil and Gas Company to the plaintiffs' petition, and there appearing

for the plaintiffs James M. Hayes, attorney, and there appearing for the defendants Beaver Oil and Gas Company E. R. Perry and George S. Ramsey, attorneys, and there appearing for the Prairie Oil & Gas Company Wm. J. Cook, Albert Z. English, Mary Severs Owens, Bessie E. English and Annie S. Cook N. A. Gibson, attorney, and after argument of counsel for and against demurrers, and consideration thereof by the court, the court finds that said demurrers should be sustained, and it is therefore ordered, adjudged, decreed and considered by the court that such of the said demurrers of the said defendants be, and the same are hereby sustained, to which ruling and order of the court the plaintiffs except, and plaintiffs' attorney therefore announce that the plaintiffs elected to stand on their petition and had no amendments to make.

Whereupon said defendants move that final judgment be entered dismissing plaintiffs' case.

And on due consideration said motion is sustained and plaintiffs' case is dismissed and all the costs are taxed to plaintiffs, for which execution will issue.

Plaintiffs' motion for receiver is denied. To all of which ruling plaintiffs excepted." (Record 14.)

In due time appeal was prosecuted from such said order and judgment to the Supreme Court of the State of Oklahoma, advanced and heard, and final decision rendered by the court on the 8th day of February, 1916, from which we quote:

"And now this cause comes on for final decision and determination by the court on the record and brief filed herein. And the court having considered the same finds that the judgment of the lower court in the above cause should be affirmed, and application for receiver dismissed. It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed, and application for appointment for receiver dismissed." (Record 19.)

Rehearing.

Plaintiffs in error filed petition for rehearing on the 16th day of February, 1916, which was, on the 14th day of March, 1916, denied by order of the court, from which we quote:

"And now on this day it is ordered by the court that the petition for rehearing filed herein be, and the same is, hereby denied." (Record 31.)

The case is now before this Honorable Court for review on writ of error.

Assignment of Errors.

The errors complained of by the plaintiffs in error as prejudicial to their substantial rights are: That the Supreme Court of the State of Oklahoma erred in holding and deciding, first:

"That the Enabling Act, Sections 13 and 21, and the Constitution, Article 25, Section 2, in effect repealed that part of Section 6 of the Supplemental Agreement (Act, June 30, 1902) providing that 'The descent and distribution of land and money provided for by an Act of Congress approved March 1, 1901, shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas,' and substituted therefor the laws of the Territory of Oklahoma thus extended to and put in force throughout the state; leaving in force the two provisions contained in Section 6, which survived and operated as such upon the laws extended to the extent of limiting the same so that 'only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation,' and 'that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in 'the laws of the State of Oklahoma.' as shown in the first point of the syllabus in said decision.

Second: That 'Rev. Laws 1910, Sec. 8416, 8417 and 8418,' applied to this case; and in holding and deciding that under said sections and Revised Laws 1910, 'as intestate left no issue or husband or mother, the father takes the estate to the exclusion of the brothers and sisters and that the seventh subdivision of the latter section has no bearing in the case,' as so held by said Supreme Court in the second point of the syllabus in this case.

Third: That in so holding and deciding that said Section 6 of said Supplemental Creek Agreement, except the provisos therein, was repealed by Sections 13 and 21 of the Enabling Act, and Section 2, Article 25, of the State Constitution; and that the same repealed that part of the second proviso,

providing that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49 and substituted thereof 'the laws of the State of Oklahoma'; and by holding and deciding that Sections 8416, 8417 and 8418 of the Revised Laws of Oklahoma 1910 alone applied to and governed the estate of said Peggy Ann Jefferson, the plaintiffs in error were thereby deprived of and denied all their rights, title, interest and estate in and to the lands in controversy in this case contrary to and violation of said Act of Congress, namely, the Original Creek Agreement, approved March 1, 1901, and the Supplemental Creek Agreement, approved June 30, 1902, specially set out and mentioned in the petition the plaintiffs in error and therein shown in Exhibits 'A' and 'B' and passed upon and construed by said State Supreme Court in the said judgment and decision; and in so holding said Sections 8416, 8417 and 8418 of said Revised Laws of Oklahoma 1910 alone applied to and governed the devolution of the title to said lands, and in failing to and refusing said lands as ancestral estate in the hands of the said Peggy Ann Jefferson under and by reason of said Acts of Congress and under the laws of descent of Oklahoma Territory as they existed at the time of the admission of said state into the Union November 16, 1907, said plaintiffs in error was also denied all their rights, title and interest in and to said lands, contrary to said Acts of Congress and contrary to said laws of descent of said Oklahoma Territory and the State of Oklahoma, which were specially set up and claimed by the plaintiffs in error in their petition, filed in said cause in the District Court of Okmulgee County, State of Oklahoma."

The errors of said State Supreme Court in its judgment and decision are more specifically and particularly set forth as follows:

"Said Supreme Court of Oklahoma in its decision in said case erred in holding and deciding:

First: That the Enabling Act, Sections 13 and 21, and the Constitution, Article 25, Section 2, in effect repealed that part of Section 6 of the Supplemental Agreement (Act, June 30, 1902) providing that 'the descent and distribution of land and money provided for by an Act of Congress, approved March 1, 1901, shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas,' and substituted therefor the laws of the Territory of Oklahoma thus extended to and put in force throughout the state.

Second: In holding and deciding that said sections of said Enabling Act and the Constitution of said state repealed all of said Section 6 of said Creek Supplemental Agreement, except the provisos therein.

Third: In holding and deciding that that provision of the second provision in said Section 6 of said Supplemental Agreement which provides 'that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49' was also repealed by said section of said Enabling Act and the Constitution of said state and substituted for 'said Chapter 49' therein provided in said Section 6, 'the Laws of the State of Oklahoma.'

Fourth: In holding and deciding Sections 8416, 8417, 8418, of the Revised Laws of Oklahoma 1910, applied in this case and governed the devolution of the title to the land in controversy upon the death of said Peggy Ann Jefferson, which occurred June 4, 1908, which was prior to the time of the Act of Congress of May 27, 1908, or the Revised Laws of Oklahoma 1910, took effect or became a law in said state, and were not applicable to the land in controversy in this case.

Fifth: In holding and deciding this case, in effect that upon the death of Peggy Ann Jefferson on June 4, 1908, her father, John J. Jefferson, Jr., took and inherited said land to the entire exclusion to the plaintiffs in error and said defendants in error Thurman Jefferson and Rebecca Jefferson, the brothers and sisters of said deceased and in decreeing said land to said other defendants in error, under and by reason of said deeds so executed to F. B. Severs by said John J. Jefferson, Jr., on June 8, 1908.

Sixth: By holding and deciding that all of said Section 6 of said Creek Supplemental Agreement, except said provisos, was general legislation of Congress, and was repealed by implication by said Enabling Act, leaving said proviso as special legislation of Congress, and therefore not repealed by said Enabling Act except as to second proviso, as above indicated, and applicable to such an estate of the law of Oklahoma.

Seventh: In holding and deciding where the title to said lands had already vested under and by reason of said Original and Supplemental Creek Agreement and in accordance with their terms, provisions and conditions in said agreements made and contained; that said agreements were not contracts, but were simply Acts of Congress, subject to repeal by Congress at any time and had no legal force or effect in

this case, and under which the plaintiffs in error and their father and mother had no right or interest specially set up claimed in the petition in error in this case and shown by Exhibits 'A' and 'B' attached thereto as conclusive evidence of such rights.

Eighth: In holding and deciding that this allotment involved in this case was governed by said Sections 8416, 8417 and 8418 of said Revised Laws of Oklahoma 1910, 'No matter how acquired—whether by descent or purchase, or whether it is ancestral or a new acquisition,' and thereby denying the complainants in error all their right, title and interest in and to said lands contrary to said Act of Congress and contrary to the laws of descent of Oklahoma Territory therein held to have been put in force by the Enabling Act, and therefore an Act of Congress itself wherein said laws of descent of Oklahoma Territory have provision for the disposition of ancestral estates as well as new acquisitions whose provisions and legal effect were thereby also denied to these plaintiffs in error by said exclusive application of said Sections 8416, 8417 and 8418 of said Revised Laws of Oklahoma 1910, contrary to the terms and provisions of said law of descent of said territory, even if the same have any application to this case or may be held to have been put in force in said State of Oklahoma by said Enabling Act and made applicable to the members of the Five Civilized Tribes and their property, after said state was admitted into the Union.

Wherefore, plaintiffs in error pray that said judgment and decision of the Supreme Court of the State of Oklahoma, dated February 8, 1916, be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by reason of said judgment and decree, and that judgment herein be rendered in favor of the plaintiffs in error and for their costs herein expended.

ARGUMENT.

The above named plaintiffs in error were plaintiffs in the lower court; the defendants in error, defendants in the lower court. In the course of this argument, we shall refer to the plaintiffs in error as plaintiffs, and to the defendants in error as defendants.

On behalf of the plaintiffs, it is contended:

First: That the Creek allotment deeds to Peggy Ann Jefferson, Exhibits "A" and "B," dated March 12, 1903, and approved April 10th, 1903, executed in pursuance of and subject to the provisions of the Acts of Congress of March 1, 1901, and June 30th, 1902, the Original and Supplemental Creek Agreement, are deeds of conveyance—contracts whose terms and sections embrace all the provisions of said Acts of Congress.

Second: That Sections 6 and 16 of said Acts of Congress of June 30, 1902, are parts of said deeds by which are designated the beneficiaries in case of the death of the allottee, Peggy Anne Jefferson; and that these parts of said deeds control the succession of the lands therein described and in controversy in this action.

Third: That said Acts of Congress, as parts of said allotment deeds, cannot be amended or repealed by subsequent legislative acts, either Federal or State, so as to change the beneficiaries designated therein, or to destroy or impair a private property right acquired thereunder by the allottee, Peggy Anne Jefferson, either on her own behalf or that of her heirs.

Fourth: The Enabling Act of June 16th, 1906, Sections 13 and 21, and the Constitution of Oklahoma, Art. 25, Sec. 2, do not substitute or repeal Sections 6 and 16 of the Act of Congress of June 30, 1902.

Fifth: Section 6 of the Act of June 30, 1902, Supplemental Creek Agreement, and the provisos therein, are special legislation; and the Revised Laws of Oklahoma 1910, Sections 8416, 8417, 8418, do not control the succession of the Creek allotment of Peggy Anne Jefferson, in controversy herein.

The facts alleged in the petition and admitted by the demurrers are as follows:

That John J. Jefferson, Jr., and Mary Alice Jefferson were, on June 9, 1905, husband and wife, and duly enrolled citizens of the Creek Nation; that Mary Alice Jefferson died, leaving her surviving her husband, John J. Jefferson, Jr., and their children, Grant M. Jefferson, Mattie R. Wasson, Willie Nolan Jefferson, Thurman Jefferson, Rebecca Jefferson, and the decedent, Peggy Anne Jefferson, all duly enrolled citizens of said Nation; that the land in controversy in this action was deeded to Peggy Anne Jefferson by Creek allotment deeds, dated March 12, 1903, and approved April 10, 1903, in pursuance of the Original and Supplemental Creek Agreements; that Peggy Anne Jefferson, on the 4th day of June, 1908, died, in infancy, intestate, not having been married, and without issue, leaving her surviving her said father and her aforesaid sisters and brothers, the owner of said lands described in said premises.

The land in controversy in this action is the allotment of Peggy Anne Jefferson, a minor Creek freedman, who died in infancy, on June 4th, 1908. She left surviving her her father, John J. Jefferson, Jr., and her brothers and sisters, Grant N. Jefferson, Mattie R. Wasson, Willie N. Nolan, Thurman Jefferson and Rebecca Jefferson, her mother, Mary Alice Jefferson, having died on June 9, 1905, and prior to the date of the death of said Peggy Anne Jefferson.

The plaintiffs contend that the allotment of Peggy Anne Jefferson ascended one-half to her father, John J. Jefferson, Jr., and the other one-half to her brothers and sisters, three of whom, Grant N. Jefferson, Mattie R. Wasson and Willie Nolan Jefferson, are the plaintiffs in this action; and Thurman Jefferson and Rebecca Jefferson, minor defendants in this action. So that there is involved in this action one-half of said allotment, which is claimed by the brothers and sisters of Peggy Anne Jefferson.

We shall proceed to take up the above propositions in the order named.

First. That the Creek allotment deeds to Peggy Anne Jefferson, Exhibits "A" and "B," dated March 12, 1903, and approved April 10, 1903, executed in pursuance of and subject to the provisions of the Acts of Congress of March 1, 1901, and June 30, 1902, the original and supplemental Creek agreements are deeds of conveyance—contracts whose terms and sections embrace all the provisions of said Acts of Congress.

It will be borne in mind that under Article 1, Section 8, of the Constitution of the United States, Congress has power to regulate commerce with foreign nations and among the several Indian tribes, and this includes the power to fix manner in which property may be taken, devised or inherited, as was said by this Court in *DeGeoffrey* v. *Riggs*, 133 U. S. 258-273:

> "It is also clear that the protection which should be offered to the citizens of one country holding property in another, and the manner in which that property may be taken, devised, or inherited are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries."

Acting under this authority the Congress of the United States passed the Act of March 3, 1893, by Section 15 of which it is provided:

> "The consent of the United States is hereby given to the allotment of lands in severalty not exceeding 160 acres to any one individual, within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments, the individuals to whom the same may be allotted shall be deemed in all respects citizens of the United States, * * * and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

By Section 16 of the same Act provision was made for the appointment of commissioners to enter into negotiations with the Five Civilized Tribes—

> "for the purpose of the extinguishment of the national or tribal title to any lands within that territory now held by any and all such nations or tribes either by cession of the

> same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union which shall embrace the lands within such Indian Territory."

By this Act of Congress, the commission so created was charged with the proper adjustment, upon the basis of justice and equity, of the rights of the United States, the Creek Nation, or tribe of Indians, and the individual citizens of said nation or tribe.

> "The individual Indian had no title or enforceable right in tribal property, but as one of those entitled to occupy the land, he did have an equitable interest, which Congress recognized, and which it desired to have satisfied and extinguished."
>
> *Choate* v. *Trapp*, 224 U. S. 665.

A right which came to the Indian as an inheritance with his existence, and from the same source, one-half from his father, and the other one-half from his mother, where both parents, as in the instant case, belonged to the tribe.

> *Schultis* v. *McDougal*, 170 Fed. 529.
> *McDougal* v. *McKay*, 59 L. Ed. 1001.

After repeated efforts by the said commission provided for in said Act, there was entered into by the said commissioners and the Creek Nation what is known as the Original Creek Agreement, Act of Congress of March 1st, 1901, and the Supplemental Creek Agreement, Act of Congress of June 30th, 1902, which acts were to ratify and confirm said agreements between the United States and the Creek Nation. This agreement existed before the said Acts of Congress. In order to become permanent and binding upon the parties to the same, and to be affected by them, these agreements must, of necessity, become Acts of Congress.

These agreements, by becoming Acts of Congress are none the less agreements between the parties thereto, or among the parties affected thereby, as provided by Section 21 of the Act of June 30, 1902:

> "This agreement shall be binding upon the United States and the Creek Nation, and upon all persons affected thereby, when it shall be ratified by Congress and the Creek National Council, and the fact of such ratification shall have been proclaimed as hereinafter provided."

To carry this agreement between the United States and the Creek Nation into effect, it provided for deeds of conveyance to the individual allottee, in Section 23 of the Act of March 1, 1901, as follows:

> "Immediately after the ratification of this agreement by Congress and the Tribe, the Secretary of the Interior shall furnish the Principal Chief with blank deeds necessary for all conveyances herein provided for, and the Principal Chief shall thereupon proceed to execute in due form, and deliver to each citizen who has selected, or may hereafter select, his allotment, which is not contested, A DEED CONVEYING TO HIM ALL RIGHTS, TITLE AND INTEREST OF THE CREEK NATION, AND OF ALL OTHER CITIZENS, IN AND TO THE LANDS EMBRACED IN HIS ALLOTMENT CERTIFICATE, and such other lands as may have been selected by him for equalization of his allotment. The Principal Chief shall in like manner, and with like effect, execute and deliver to the proper parties deeds of conveyance in all other cases herein provided for. * * * All conveyances shall be approved by the Secretary of the Interior, which shall serve *as a relinquishment to the grantee of all the rights, title and interest of the United States in and to the land embraced in said deed.* Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to same, except the proceeds of the land reserved from allotment. The acceptance of deeds of minors and incompetents by persons authorized to accept these allotments for them shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of other lands of the tribe, as provided herein."

By Section 6, of the Supplemental Agreement, act of June 30th, 1902, is provided as follows:

"Sec. 6. The provisions of the act of Congress approved March 1st, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation are hereby repealed, and the descent and distribution of land and money provided for by said act shall be IN ACCORDANCE WITH CHAPTER 49 OF MANSFIELD'S DIGEST OF THE STATUTES OF ARKANSAS, NOW IN FORCE IN INDIAN TERRITORY; provided, that only citizens of the Creek Nation, male and female, and their Creek descendants, SHALL INHERIT LANDS OF THE CREEK NATION; and, provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the INHERITANCE SHALL GO TO NON-CITIZEN HEIRS in the order named in said Chapter 49."

By Sec. 19 of the said Supplemental Creek Agreement, it is further provided that Section 8 of the agreement ratified by said act of Congress of March 1st, 1901, is amended, and as so amended, is re-enacted to read as follows:

"The Secretary of the Interior shall, through the United States Indian Agent of said Indian Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land, and remove therefrom all persons objectionable to him; and, when any citizen thereafter makes selection of his allotment, as herein provided, and receives certificate therefor, he shall be immediately thereupon so placed in possession of his land, and during the continuance of the tribal government, the Secretary of the Interior, through such Indian Agent, shall protect the allottee in his right to possession against any and all persons claiming under any lease, agreement, or conveyance not obtained in conformity to law."

It will appear from the foregoing, first, that title to the land is provided for; second, its succession; and, third, its possession. In these we have the three essentials of an estate of inheritance and all property rights.

When the Creek citizen, Peggy Anne Jefferson, accepted her said deeds and went into possession of the lands therein described, her title to the same was completed, and an executed contract was made. By this contract and deed, the United States and the

Creek Nation granted to Peggy Anne Jefferson all their right, title and interest in and to the lands described in said deeds of conveyance. At the same time, and by the same contract and as a conisderation therefor, Peggy Anne Jefferson relinquished all her right, title and interest in and to all the other lands in the Creek Nation, except in the proceeds of the lands reserved from allotment, surrendered and gave up her free, though savage life, and accepted the burdens of citizenship in the United States.

By the aforesaid provisions, the right of the individual allottee in the tribal property was merged and segregrated *into an ancestral estate by inheritance* of 160 acres of land. There was here, then, an offer of the land and the fee simple title thereto —an estate of inheritance. Acceptance by the party to whom the offer was made, with the consequent relinquishment of all claim to other lands, furnished a part of the consideration, if any was needed, to sustain the grant.

Wisconsin, etc., R. R. Co. v. *Powers,* 191 U. S. 386.

Upon delivery of the allotment deed or patent, the agreement was executed and the Indian was thereby vested with all the rights conveyed by the allotment deed or patent, and like a grantee in a deed, poll, or a person accepting the benefit of a conveyance, bound by its terms, although it was not actually signed by him.

Keller v. *Ashford,* 133 U. S. 621.
Choate v. *Trapp,* 224 U. S. 665.

In the latter case, the court having under consideration a patent similar to the one in the case at bar, quoting from the case of *New Jersey* v. *Wilson,* 7 Cranch. 164, said:

> "Every requisite to the formation of a contract is found in the proceedings in the then colony of New Jersey and the Indians. The subject was a purchase on the part of the Government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the property. A proposition to this effect was made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from tax-

> ation; and then in consideration of the arrangements previously made, one of which this Act of the Assembly is stated to be, the Indians executed their deed of cession. *This certainly is a contract clothed with forms of unusual solemnity.* The privilege, though for the benefit of the Indians, is annexed by the terms which create it, to the land itself, not to their persons."

In support of which the court cited with approval the case of *Fletcher* v. *Peck,* 6 Cranch. 87, wherein Chief Justice Marshall said:

> "In considering this very interesting question, we might ask ourselves, what is a contract? Is a grant a contract? A contract is a compact between two or more parties, and is either executionary or executed. * * * A grant in its own nature amounts to an extinguishment of the rights of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. * * * A law annulling conveyances between individuals and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as the law discharging the vendors of property from obligations of executing their contracts by conveyances. It would be strange if a contract to convey were secured by the Constiuttion, while absolute conveyances remained unprotected."

It follows of necessity from the foregoing that Exhibits "A" and "B," allotment deeds, filed with plaintiffs' petition are contracts, and that the Supreme Court of the State of Oklahoma erred when under *Gritts* v. *Fisher,* 224 U. S. 641, it decided that such deeds were not contracts.

B.

That Sections 6 and 16 of said Acts of Congress of June 30th, 1902, are parts of said deeds by which are designated the beneficiaries in case of the death of the allottee Peggy Anne Jefferson, and that these parts of said deeds control the succession of the lands therein described and in controversy.

Sections 6 and 16 of said Supplemental Creek Agreement, Act of June 30, 1902, are as follows:

> "Sec. 6. The provisions of the Acts of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed as the descent and distribution of land and money provided for by said Act shall be in ACCORDANCE WITH CHAPTER 49 OF MANSFIELD'S DIGEST OF THE STATUTES OF ARKANSAS, NOW IN FORCE IN INDIAN TERRITORY; provided, that only CITIZENS OF THE CREEK NATION, male and female, and their Creek descendants, SHALL INHERIT LANDS OF THE CREEK NATION; and, provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, that the INHERITANCE shall go to non-citizen heirs in the order named in said Chapter 49.
>
> Sec. 16. Lands allotted to citizens shall not, in any manner whatever, or at any time be encumbered, taken or sold, to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior. Each citizen shall accept from his allotment 40 acres of land, or a quarter of a quarter of a section, as a homestead, which shall be and remain non-taxable, inalienable and free from any encumbrance whatever for 21 years from the date of deed therefor, and a separate deed shall be issued to each allottee for his homestead in which this condition shall appear. Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if, for any reasons, such selections be not made for any citizen, it shall be the duty of said Commissioners to make selections for them. The homestead of each citizen

shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he has no such issue, then he may dispose of his homestead by will, free from the limitation herein proposed, and, if this be not done, the land embraced in this homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise provided. * * * Any agreement or conveyance of any kind or character, violating any of the provisions of this paragraph, shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Chapter 49 of Mansfield's Digest of the Laws of Arkansas, referred to and embraced in the aforesaid Section 6 of the said Supplemental Creek Agreement, is as follows:

"Section 2522. When any person shall die, having title to any real estate, or inheritance or personal estate (b) not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and widow's dower in the following manner:

First: To children, or their descendants, in equal parts.

Second: If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third: If there be no children, nor their descendants, father, mother, brother or sister, nor their descendants, then to the grandfather, grandmother, uncles, and aunts, and their descendants in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestors and their children and their descendants, in equal parts.

Sec. 2523. Posthumous children of intestate shall inherit in like manner as if born in life time of intestate, but no right of inheritance shall accrue to any person other than the children of the intestate, unless they be born at the time of the intestate's death.

Sec. 2524. Illegitimate children shall be capable of inheriting and transmitting, and inheriting on the part of their mother, in like manner as if they had been legitimate of their mother. (c.)

Sec. 2525. If a man have by a woman a child or children, and afterwards shall intermarry with her, and shall recognize such children to be his, they shall be deemed and considered legitimate.

Sec. 2526. The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate.

Sec. 2527. In making title by descent, it shall be not barred to a demandant, that any ancestor from whom he derives his descent from intestate is, or has been, an alien.

Sec. 2528. If there be no children, nor their descendants, father, mother, nor their descendants, or any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or husband of the intestate. If there be no such wife or husband, then the estate shall go to the State.

Sec. 2529. If any of the children of an intestate be living, and some be dead, the inheritance shall descend to the children who are living, and to the descendants of such children as shall have died; so that each child who shall be living shall inherit such share as would have descended to him if all the children of the intestate who shall have died, leaving issue, had been living, so that the descendants of each child who shall be dead shall inherit the same their parents would have received, if living.

Sec. 2530. The rule of descent prescribed in the last preceding section shall apply, in every case, when the descendants of the intestate entitled to share in the inheritance shall be in equal degree of consanguinity to the intestate, so that those who are in the nearest degree of consanguinity shall take the share which would have descended to them and all the descendants in the same degree shall have died, leaving issue living, so that the issue of the descendants who shall have died shall, respectively, take the shares which their parents, if living, would have received.

Sec. 2531. IN CASE WHERE THE INTESTATE SHALL DIE WITHOUT DESCNDANTS, IF THE ESTATE COME BY THE FATHER, THEN IT SHALL ASCEND TO THE FATHER AND HIS HEIRS; IF BY THE MOTHER, THE ESTATE, OR SO MUCH THEREOF AS CAME BY THE MOTHER, SHALL ASCEND TO THE MOTHER AND HER HEIRS; BUT IF THE ESTATE BE A NEW ACQUISITION, IT SHALL ASCEND TO THE FATHER FOR HIS LIFE TIME AND THEN DESCEND, IN REMAINDER, TO THE COLLATERAL KINDRED OF THE INTESTATE, IN THE MANNER PROVIDED IN THIS ACTION; AND, IN DEFAULT OF THE FATHER, THE MOTHER, FOR HER LIFE TIME; THEN TO DESCEND TO THE COLLATERAL HEIRS, as before provided.

Sec. 2532. The estate of an intestate, in default of the father and mother, shall go, first, to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation.

Sec. 2533. Relation of the half blood shall inherit equally with those of the whole blood, in the same degree; and the descendants of such relatives shall inherit in the same manner as descendants of the whole blood, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Sec. 2534. In all cases not provided for by this Act, the inheritance shall descend according to the course of the common law.

Sec. 2535. Whenever an inheritance, or a share of an inheritance shall descend to several persons, under provisions of this Act, they shall inherit as tenants in common in proportion to their respective shares or rights."

That said sections 6 and 16 of the Supplemental Creek Agreement, Act of June 30, 1902, and the aforesaid sections of Mansfield's Digest of the Laws of Arkansas, above set out, are parts of and terms of said allotment deeds made between the United States and the Creek Nation, as grantors, and the allottee, Peggy Anne Jefferson, is declared by the parties themselves, in said allotment deeds hereinbefore referred to.

The language of the allotment deeds is in part as follows:

"Now, therefore, I the undersigned Chief Principal of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said Peggy Anne Jefferson, all right, title and interest of the Muskogee (Creek) Nation, and of all other citizens of said Nation, in and to the following described land * * * subject, however, * * * to the provisions of the Act of Congress approved June 30, 1902. (Record, p. 6, Exhibit "A.")

Again:

"Now, therefore, I, the undersigned, Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and

> authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said Peggy Anne Jefferson, all right, title, and interest of the said Nation in and to the following described land; * * * and subject also to the provisions of the said Act of Congress relating to * * * the descent of said land after the death of said Peggy Anne Jefferson * * * and subject to the provisions of the Act of Congress approved June 30, 1902." (Record, p. 7, Exhibit "B.")

The allotment deeds, Exhibits "A" and "B," and the aforesaid sections 6 and 16 embraced therein, make disposition of the said lands after the death of the allottee, Peggy Anne Jefferson. The succession of said lands is provided for therein. To take the allotment without said provisions, the allottee, Peggy Anne Jefferson, would take a life estate only in the land. The said provisions, then, that the land should descend, add value to the estate, the measure of which is the difference between a life estate, in said premises, and a fee simple title thereto or an estate of inheritance.

To illustrate: Strike, if you please, from said deeds sections 6 and 16 and the provisions of Mansfield's Digest embraced therein, and you have the allottee, Peggy Anne Jefferson, vested with a title to said land described in said deeds, which in fact amounts to nothing more than a life estate.

To further illustrate: Suppose that on the day after Peggy Anne Jefferson accepted said deeds and went into possession of said lands on April 10th, 1903, that the Congress of the United States had repealed said sections 6 and 16, and the provisions of Mansfield's Digest therein, leaving no law to carry the succession of said lands, and that Peggy Anne Jefferson had died on the 20th day of April, 1903, what would have become of her allotment?

In the event supposed, there would be no law of descent or distribution to make disposition of said allotment at the time of her death, except said provisions in said deeds. Would then the allotment to Peggy Anne Jefferson, at her death on April

20th, 1903, revert to the United States? Undoubtedly it would have, except for the provisions of sections 6 and 16 embraced in said allotment deeds, Exhibits "A" and "B," controlled it.

If there were any terms in said deeds in which the Creek Nation and its citizens were more interested, or to which they gave more particular attention than to any other terms in said deeds, it was those provisions which related to the descent or succession of their lands. Succession was a new law introduced into their affairs. The provisions in said deeds were of the greatest importance to them, as they made disposition of their lands after death. Naturally they were interested in the persons who were to take them in succession. It is natural that the Creek citizen heirs would be first named in the deeds which were to govern, or make disposition of their lands; then the non-Creek citizen. This is observed by the Supreme Court of the State of Oklahoma in the opinion in this case, and thus referred to by it:

> "But to one familiar with the history of these times, it is known that the Creeks were averse to allotment; that they clung tenaciously to their laws, and were especially anxious that their lands, when allotted and descent cast, should not be inherited by strangers. This feeling was so strong when the Original Creek Agreement of March 1, 1901, was entered into between certain representatives on the part of the United States, and certain representatives on the part of the Creek Nation, that there was provided in Section 7 thereof, that, after the homestead of the intestate allottee had served its purpose, the land should descend to his heirs according to the laws of descent and distribution of the Creek Nation; and, in Section 28, that, if a citizen of the Nation, or a child entitled to allotment as such, should die before receiving his or her share of the fund of the tribe, the land and money to which he would be entitled, if living, should also descend. In thus deferring to the desires of this dependent people, it would seem that Congress, from out the general laws of descent and distribution in force in the Indian Territory, made an exception to the Creek and his allotted lands, by thus placing upon the statute special legislation, in effect, that in cases of intestates, upon descent cast, those lands should descend according to the laws of descent and distribution of the Creek Nation." (Record, p. 23.)

As aforesaid, under Art. I, Sec. 8, of the Constitution it was competent for the United States, as with foreign nations, to provide the manner in which the property of the Indian tribes may be taken, devised, or inherited, and the same are fitting subjects for such negotiation or regulation by mutual stipulation.

So long as the land in controversy in this action was tribal property, it did not descend and no law of descent or distribution ever attached thereto. When it ceased to be tribal property, and became private property, that instant a law of descent and distribution attached thereto. Who, then, put in force Sections 6 and 16 of the Supplemental Creek Agreement, Act of Congress, June 30, 1902, with reference to the land in controversy in this action?

Was it the aforesaid Act of Congress?

No.

Was it the act of the Creek Nation?

No.

It was the joint act of the United States and the Creek Nation as grantors, and Peggy Anne Jefferson as grantee.

As was said by this Court in the case of *Woodward* v. *De-Graffenried*, 59 L. Ed. 1310:

> "At the same time, the Curtis Act allotments were brought under the provisions of the Agreement respecting the conveyance of the tribal title, etc. We see no evidence of a purpose to put allotments, previously made, upon a different basis in any respect from allotments thereafter to be made; on the contrary, the phrase used in Sec. 6 is 'that the confirmed allotments shall, as to appraisement and all things else, be governed by the provisions of this Agreement.' We construe the section to mean that allotments theretofore made, if not inconsistent with the provisions of the Agreement, were to be treated the same as *if made after the ratification of the agreement; and this includes the designation of the beneficiaries in case of the death of an allottee.*"

So that said allotment deeds by express provision made through Sections 6 and 16 aforesaid, and the sections of Mansfield's Digest embraced therein, make disposition of such lands after the death of the allottee, Peggy Anne Jefferson, by designating the beneficiaries in case of her death.

By Sec. 2531 of Mansfield's Digest embraced in said Sections 6 and 16, and the allotment deeds, Exhibits "A" and "B," it was provided that if the decedent, Mary Alice Jefferson, leaves several children (Grant, Mattie R., Peggy Anne, Thurman, Rebecca, and Willie Nolan) and any such surviving child (Peggy Anne) dies under age, not having been married, all the estate (one-half of her Creek allotment) that came to the deceased child (Peggy Anne) by inheritance from such decedent, descends in equal shares to the other children (Grant, Mattie R., Rebecca, Thurman, and Willie Nolan) of the same parent. In other words, Peggy Anne Jefferson contracted with the United States and the Creek Nation that in the event of her mother's death prior to that of hers, during her minority, leaving surviving her brothers and sisters and her father, that the land so conveyed and in controversy in this action should ascend one-half to her father and the other one-half to her brothers and sisters above named.

The beneficiaries designated by the allotment, like the beneficiary in a life insurance policy, or a person for whose benefit a contract has been made, took a vested interest in the allotment deeds. The grantors could not, without the consent of the grantee, change the beneficiaries designated by the allotment. Peggy Anne Jefferson, the grantee, from the date of the delivery of the patents on the 10th day of April, 1903, to the date of her death never agreed or consented to any change of the beneficiaries under said allotment deeds. To change these beneficiaries without the consent of the grantee, in said deeds, would be to confiscate one-half of the allotment of Peggy Anne Jefferson and the right, title and interest therein of her brothers and sisters, the plaintiffs in error.

The United States and the Creek Nation, as grantors, in said allotment deeds had unlimited power of the disposition of the lands embraced therein. That is to say, who should take the lands conveyed to Peggy Anne Jefferson in the event of her death, leaving surviving her her father and her brothers and sisters. Congress and the Creek Nation did fix by express terms in said deeds, by adopting Sections 6 and 16 of the Supplemental Creek Agreement as a part of said deeds, the persons to take the

lands allotted to Peggy Anne Jefferson in the event which has happened. The lands must go to the persons designated by the terms of said deeds.

In further support of this contention, we cite *McLeod* v. *Board*, 94 Am. Dec. 301, wherein the Court said:

> "But * * * we see no reason why the *lex loci contractus* may not by positive agreement be made the rule for determining the parties who shall take as heirs or distributees on the failure of the wife to dispose of the property by will, or otherwise, as well as to govern the construction of the contract in all other respects."

And again, in the case of *Robinson* v. *Legrand*, 65 Ala. 111, the Supreme Court of Alabama had under consideration a deed which under its terms stipulated:

> "But should he (intestate) die without wife or children or child, then it (the land) shall pass according to the statute of descent and distribution of the State of Alabama NOW IN FORCE."

In the course of the opinion the court says:

> "We think the last three words of the clause above are the key to the grantor's meaning. If the grantee died without wife or children that the land was to pass according to the laws of descent that might then be in force * * * the language is, 'SHALL PASS ACCORDING TO THE STATUTE OF DESCENT NOW IN FORCE.' It was competent for the Legislature to change this statute of descent. Suppose they have done so between the making of the deed and the death of the grantee. Would it or could it be contended that these lands would pass by descent under the new statutes? Such claim would expunge from the deed the words, 'NOW IN FORCE.' Will it be contended that in that event, the lands will descend according to the statutes in force when the deed was made? That could not be, for in the event supposed that statute would have been repealed. The law cannot cast a title according to the terms of a statute which had ceased to exist before the happening of the event upon which its powers are invoked. Mrs. Robinson had unlimited power of disposition to direct who should take in the event which has happened. They were and are the persons who would fill the relation of next of kin—heirs at law, at grantee's death, according to the principles of descent in force when the deed was made, June 17th, 1873. The language of the deed may be paraphrased as

follows without changing its import: 'Should he die without a wife or child, then the land shall pass to those persons who take by descent under the statutes of Alabama as they now exist.' "

The Supreme Court of the State of Oklahoma, by its opinion in the case at bar, expunges from the allotment deeds, Exhibits "A" and "B," the following language:

> "And subject, also, to the provisions of said Act of Congress relating to the * * * descent of said land after the death of said Peggy Anne Jefferson * * * and to the provisions of the Act of Congress approved June 30, 1902,"

and by so doing did violence to this solemn contract of the United States and the Creek Nation made with its humblest ward, a minor Creek freedman.

C.

The Contract and Its Construction.

Had not Sections 6 and 16 been written by express provision into the allotment deeds, Exhibits "A" and "B," filed with plaintiffs' petition and made a part thereof, following that universal principle of law that every contract must be interpreted with reference to the law in force at the time of its execution, it was the duty of the Supreme Court of the State of Oklahoma to construe the allotment deeds and the legislation of Congress together.

In *Pritchard* v. *Norton*, 106 U. S. 136, the court said:

> "In every forum a contract is governed by the laws with a view to which it is made, because by the consent of the parties that law becomes a part of their agreement."

Wayman v. *Southard*, 10 Wheaton 48.
Anthony v. *Greenhow*, 107 U. S. 769.
McCullough v. *Virginia*, 170 U. S. 112.

In the case of the *Missouri, Kansas & Texas Railway Company* v. *Kansas-Pacific Railway Company*, 97 U. S. 491-497, Mr. Justice Field, speaking for the court, said:

> "It is always to be borne in mind in construing a congressional grant, that the Act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress."
>
> *Jones* v. *Meehan*, 175 U. S. 1, 44 L. Ed. 49 (Article 5, Bill of Rights).

Was such effect given to the grants, Exhibits "A" and "B," as will carry out the intention of Congress expressed in Sections 6 and 16 of the Act of June 30, 1902, which Act of Congress declared solemnly that:

> "This Agreement shall be binding upon the United States and the Creek Nation, and upon all citizens affected thereby, when it shall have been ratified by Congress and the Creek National Council, and the fact of such ratification shall have been proclaimed as hereinafter provided."

Again, in *Choate* v. *Trapp*, 224 U. S. 665, this Court says:

> "The record contains no copy of any of the patents under which the plaintiffs hold. But the Act provided that they should be framed in conformity with the Atoka Agreement. Those who signed the patent could not convey more rights than were granted by that part of the Curtis Act, nor could they, by omission, deprive the patentee of any exemption to which he was thereby entitled. The patent and the legislation of Congress must be construed together, and when so construed they show that Congress, in consideration of the Indian's relinquishment of all claim to the common property, and for other satisfactory reasons, made a grant of land which should be non-taxable for a limited period. The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself."

So by construction and by express provision, Sections 6 and 16 of the Act of Congress, June 30, 1902, are parts of and terms of deeds, Exhibits "A" and "B," and designated the beneficiaries on the death of the allottee, Peggy Anne Jefferson.

That said Acts of Congress, as parts of said allotment deeds, cannot be amended or repealed by subsequent legislative acts, either Federal or State, so as to change the beneficiaries designated therein, or to destroy or impair a private property right acquired thereunder by the allottee, Peggy Anne Jefferson, either on her own behalf or that of her heirs.

We have seen that to strike these provisions from said deeds, Exhibits "A" and "B," would be to reduce the grant from a fee simple title or an estate of inheritance to a life estate only.

In *Choate* v. *Trapp, supra,* the Court said:

> "No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres, or fifty acres, or the timber growing on the land. After he accepted the patent the Indian could not be heard, either at law or in equity, to assert any claim to the common property. If he is bound, so is the tribe, and the Government when the patent was issued."

If Congress had no power to abrogate Sections 6 and 16, after the acceptance of deeds, with reference to the land therein contained, and reduce the same from a fee simple title to a life estate, it follows, of necessity, that Congress could not change same or the beneficaries named therein. The power to change implies the power to abrogate.

We insist on behalf of the said plaintiffs that no change could be made in the terms and conditions of which descent and distribution are one, in the said contract and Act of Congress, between Peggy Anne Jefferson on the one side and the United States and the Creek Nation on the other, without the consent and approval of the said Peggy Anne Jefferson; first, because the said Acts of Congress and the said deeds of conveyance, together with all the terms thereof, of which descent and distribution are a part, is a contract between Peggy Anne Jefferson of the one part and the United States and the Creek Nation of the other part; second, because the land conveyed by the aforesaid deeds of conveyance was the individual and private property of Peggy Anne Jefferson from the date of the execution and approval of the said deeds; third, because any Act of Congress, such as would change any of the terms or conditions of the said contract between the United States and the Creek Nation of the one part and Peggy Anne Jefferson of the other part, without the consent and approval of the said Peggy Anne Jefferson, would be in violation of, and contrary to the terms and conditions of said contract and in violation of that clause of the Constitution of the United States which pro-

vides, "No person shall be deprived of property without due process of law." (Art. 5, Bill of Rights.)

The deeds of conveyance aforesaid, and the aforesaid Acts of Congress, known as the Original and Supplemental Creek Agreements, constitute one contract and must be construed together as one and a single agreement.

This contract was made not only to cover the present condition, but provided for future events. The contract looking both to the present and to the future, provided for deeds of conveyance and for the descent and distribution of the estate after the death of said Peggy Anne Jefferson and a disposal of her private property by the terms of said deeds above quoted. Under the terms of the contract a preference right is given to the Creek citizens and their Creek descendants, designated and named by and under the terms of the contract and under the aforesaid sections of Mansfield's Digest above referred to, as a part thereof.

It is as beneficaries under said contract that the plaintiffs assert their rights in this Court to said property, to-wit: An undivided one-half interest in and to said allotment of Peggy Anne Jefferson.

D.

The Enabling Act of June 16, 1906, Sections 13 and 21, and the Constitution of Oklahoma, Article 25, Section 2, do not substitute or repeal Sections 6 and 16 of the Act of Congress of June 30, 1902.

The Enabling Act was to enable the people of Oklahoma Territory and the people of Indian Territory to form a Constitution and State government, and to be admitted into the Union on an equal footing with the original states. Two peoples were to form a Constitution and State government. These peoples lived under different laws and different governments. Their property, both real and personal, was owned and alienated under different laws. The lands of the Indian Territory ascended and descended under certain Acts of Congress; the lands of Oklahoma Territory ascended and descended under the laws of the Territory of Okla-

homa. The estates of Indian citizens were administered under the laws of Congress, the tribal lands and tribal funds were administered separately and under special Acts of Congress; the estates of citizens of Oklahoma Territory were administered under the laws of the Territory of Oklahoma.

The people of the Indian Territory had no local self government and no system of local laws, except the uses, customs, and laws peculiar to each tribe or nation. The people of Oklahoma Territory had local self government and a system of local laws.

The lands of the Indian Territory were not a part of the public domain, but owned in fee by the Indians and Indian tribes; the lands of Oklahoma Territory were part of the public domain with the fee in the United States. The lands of the Indian Territory were allotted among the members of the tribes by reason of certain Acts of Congress; the lands of Oklahoma Territory were patented to homestead entrymen under particular Acts of Congress. The lands of Indian Territory were restricted; the lands of Oklahoma were unrestricted.

The members of the Indian Tribes were and are wards of the Government; the people of Oklahoma Territory are not and never have been wards of the Government. The United States had treaty relations with the Indian tribes, "People distinct from others." The United States never had any treaty relations with the people of Oklahoma Territory.

Then, the legal status of the Indian and Indian tribes and their property was wholly different and distinct from the legal status of the other people or citizens and their property of the proposed state. The laws applicable to the one were wholly inapplicable to the other. Congress, familiar with this dual system of laws and peoples, passed the Enabling Act of June 16th, 1906.

On opening the Enabling Act, Congress provided first for the person and property of its Indian wards, as follows:

> "That nothing contained in said Constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished), or to limit the authority of the Congress of the United States to make any law or regulation respecting such Indians, their lands, property, or

> other rights, by treaties, agreements, laws, or otherwise, which it would have been competent to make if this Act had never been passed."

By these words Congress declared to the people of Oklahoma Territory and to the people of the Indian Territory that it retained jurisdiction over the person and property of the Indians of said Territories, and in doing this it declared with equal force, it seems to us, that it retained the laws and treaties enacted by Congress respecting such Indians, their lands and property; and that these laws and treaties should remain and operate, after statehood, as before, in the proposed State.

In this respect the citizens of the Five Civilized Tribes were and are a "people distinct from others"; that they and their property were controlled under the treaties with the United States and the Acts of Congress the same after statehood as before. So when the Enabling Act speaks of the inhabitants of the Territories, their property, and their laws, it speaks of them to the exclusion of the Indians in said Territory, their rights of person and property; and that their rights of person and property were not to be governed or controlled by the laws of Oklahoma Territory to be spread over the proposed State.

By the said provision in Section 1, the jurisdiction of the proposed State over the rights of person and property of the Indian tribes was excluded, and by the same provision Congress declared to the people of the proposed State that it retained its jurisdiction and laws pertaining to the rights of person and property of the Indians of said Territory.

In *Ex Parte Webb*, 56 L. Ed. 1248, this Court said:

> "In addition there is the proviso contained in Section 1 of the Act that nothing contained in the State Constitution shall be construed to 'limit or affect the authority of the government of the United States to make any law or regulation respecting the Indians, their land, property or other rights by treaties, agreements or law or otherwise which it would have been competent to make if this Act had never been passed.'
>
> It is contended that this does not preserve the existing laws and regulations respecting the Indians, but rather excludes the inference of their continued force and existence,

by indicating a purpose on the part of Congress to thereafter enact regulations for the protection of the Indians in Oklahoma, if necessity require. This we think is an inadmissible construction. We deem it unreasonable to suppose that Congress, possessing the constitutional power and recognizing the moral duty to make laws and regulations respecting the Indians, and having already established laws and regulations of this character applicable in the Territory, including some that were established by treaties and agreements, should resolve to wipe them out and thereby impose upon future Congresses the labor and difficulty of establishing other treaties, laws and regulations in their stead.

In our opinion the purpose expressed in the proviso to reserve to the government of the United States the authority to make laws and regulations in the future respecting the Indians is, under the circumstances, evidence tending to negative a purpose to repeal by implication the existing laws and regulations on the subject. * * *"

In the case of *Bluejacket* v. *Commissioners of Johnson County*, 18 L. Ed. 607, it is said:

"The lands belonging to the United Tribe of Shawnee Indians residing in Kansas are not taxable. They are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of the state laws. * * * If the tribal organization of the Shawnees is preserved intact and recognized by the Political Department of Congress as existing, then they *are a 'people distinct from others,'* capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the United States. If under the control of Congress from necessity there can be no divided authority. * * * As long as the United States recognizes their National character, they are under the protection of the treaties and the laws of Congress, and their property is withdrawn from the operation of State laws."

If the property of the Indian Tribes is withdrawn from the operation of State laws, as it is, their property is excluded from the state laws of descent and distribution.

The position of the Indian Tribes in our governmental affairs is a unique one, recognized by Congress as separate and distinct from other people within the confines of the United States, and likewise recognized by the decisions of both state and federal courts as such.

It is further said in the case of *United States* v. *Kagama*, 30 L. Ed. 228, 118 U. S. 375-385:

> "The relation of the Indian Tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomolous one and of a complex character. Following the policy of the European governments in the discovery of America toward the Indians who were found here, the colonies before the Revolution, and the states of the United States since have recognized in the Indians a possessory right to the soil over which they roamed and hunted, and established occasional villages; but the asserted ultimate title in the land itself by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of then paramount authority. When a tribe wished to dispose of its land, or any part of it, or the states or United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons or any other nations to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were and always have been regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of full attributes of sovereignty, but as a separate people with the power of regulating their own internal and social relations, and thus far not brought under the laws of the Union, or of the State within whose limits they reside."

So the provisio in Section 1 defines the jurisdiction of Congress over the rights of person and property pertaining to the Indians in said territory; also by said provision in said Section 1, the jurisdiction of the people of the proposed State of Oklahoma, and the State of Oklahoma, over the rights of person and property pertaining to the Indians is denied.

Now, in order that there could be no misunderstanding between the people of the proposed State of Oklahoma, and the State of Oklahoma, and the United States as to the jurisdiction of each, Congress provided by Sub-division 3 of Section 3 of the Enabling Act, as follows:

> "That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title

> in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, *the same shall be and remain subject to the jurisdiction, disposal and control of the United States.*"

Here the Enabling Act declares that the people inhabiting said proposed state shall forever disclaim all right and title to all lands lying within said limits owned or held by any Indian, tribe or nation; and that the same shall remain subject to the jurisdiction, disposal and control of the United States, as if this act had never been passed. It, therefore, seems clear that these provisions of the Enabling Act continue in full force and effect all the previous treaties and acts of Congress, which in any way dealt with the rights of person or property pertaining to the Indians of said territory, including the aforesaid statutes of descent and distribution, as set forth in Section 6 of the Supplemental Creek Agreement.

In *Tiger* v. *Western Investment Co.*, 221 U. S. 284-286, 55 L. Ed. 738, Justice Day, speaking for this Court, says:

> "In passing the Enabling Act for the admission of the State of Oklahoma, where these lands are, Congress was careful to preserve the authority of the government of the United States over the Indians, their land and property, which it had prior to the passage of the act."

So it is no longer an open question, but a closed one, that the authority and jurisdiction of the government of the United States over the Indians, their land and property, are the same after statehood as before, "and as though the Enabling Act had never been passed."

In *Ex Parte Webb, supra*, this Court said:

> "The reservation of the authority of Congress to legislate in the future respecting the Indians residing within the new State is clearly supportable under the Constitution, Art. 1, Sec. 8, which confers upon Congress the power to regulate commerce with foreign nations and among the several states, and with the Indian tribes. It has been repeatedly held by this court that under this clause, traffic or

> intercourse with an Indian tribe, or with a member of such a tribe, is subject to the regulation of Congress, although it be within the limits of a State. (Citing authorities.) And it is clearly consistent with the Constitution to maintain in force an existing act of Congress relating to such traffic and intercourse, so that it shall continue effective within the limits of the new state, as it is to reserve the right to enact new laws in the future upon the same subject matter. We must read the proviso contained in Sec. 1 of the Enabling Act, and also the declaration in Sec. 21 that 'the laws of the United States not locally inapplicable shall have the same force and effect within such state as elsewhere within the United States,' in the light of the existing relations then recently established by treaties and by acts of Congress between the government of the United States and the Five Civilized Tribes that occupied the area known as the Indian Territory. Although those tribes had long been treated more liberally than other Indians, they remained wards of the government and in all respects subject to its control. (Citing authorities.)"

To the same effect is *U. S.* v. *Sandoval*, 231 U. S. 36-48. 58 L. Ed. 107.

It would seem then that it is no longer an open question that the Act of March 1st, 1901, the Original Creek Agreement, and the Act of June 30th, 1902, the Supplemental Creek Agreement, remained in full force and effect after statehood as before, and "as though the Enabling Act had never been passed."

Section 13 of the Enabling Act, in part, provides as follows:

> "That the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the legislature thereof."

Section 21 of the Enabling Act, in part, provides as follows:

> "And all laws in force in the Territory at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act, and by the Constitution of the State; and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States."

Here, as in the beginning, Congress had in view the dual system of laws and the dual peoples, and by said sections the

laws of the state are given force where intended, and the laws of Congress are given force and effect where they existed.

These provisions of the Enabling Act, when taken and construed together with the provisions hereinbefore set out, according to the rules of construction, must be construed so as to give effect to each of said provisions. When so construed, it cannot be successfully contended that the provisions of said sections 13 and 21 refer to or embrace the rights of person or property pertaining to the Indians, but refer to and embrace the rights of person and property of the other inhabitants of said territories; and when so construed, the laws of Oklahoma put in force throughout the state through said sections, are the laws affecting all the inhabitants of the proposed state and their property, except the Indians and their property.

The rights of person and property of the Indians having been withheld from the inhabitants of the territories in forming a state constitution and a state government, it necessarily follows it seems to us that no law of the territory of Oklahoma could be applicable to the rights of person or property so excluded. In other words, the Enabling Act, together with its several provisions, cannot be construed to withhold the rights of person and property of the Indians from the jurisdiction and power of the State of Oklahoma, and at the same time grant authority to put into effect the laws of the territory over the rights of the persons and property so excluded.

By the foregoing provisions of the Enabling Act the jurisdiction of the United States and the jurisdiction of the State of Oklahoma are each clearly defined. The laws to operate in each jurisdiction are also clearly defined by said section 21, *supra*.

The first clause defines the laws to operate in the jurisdiction of the proposed state.

And the second clause defines the laws to operate within the jurisdiction of the United States.

To this point we have been considering the different provisions of the Enabling Act. We shall now examine the constitution of the State of Oklahoma with reference to its jurisdiction and laws.

Sec. 3, Art. 1, provides as follows:

> "The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands, lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation, and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States."

Furthermore, by Sec. 45 of Art. 24, it is provided:

> "Be It Ordained, by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of Congress of the United States, entitled, 'An Act to Enable the People of Oklahoma and the Indian Territory to form a Constitution and State Government and be admitted into the Union on an equal footing with the original states * * *"

By said section and ordinance irrevocable, the people of the proposed State of Oklahoma declare and affirm in the most solemn manner the jurisdiction of the United States over the rights of person and property of the Indians, as the same is set forth and defined in the Enabling Act.

It of necessity, therefore, follows, that all the rights of person and property of the Indians in these territories are excluded from the jurisdiction, authority and power of the State of Oklahoma and the people thereof.

Sec. 2, Art. 24, of the Constitution of Oklahoma provides as follows:

> "All laws in force in the Territory of Oklahoma, at the time of the admission of the state into the Union which are not repugnant to this Constitution, and WHICH ARE NOT LOCALLY INAPPLICABLE, SHALL BE EXTENDED TO AND REMAIN IN FORCE IN THE STATE OF OKLAHOMA UNTIL THEY EXPIRE BY THEIR OWN LIMITATION, OR BE ALTERED OR REPEALED BY LAW."

This section of the Constitution of Oklahoma must be read in connection with the sections above and so construed as to give effect to each of said sections, and when so read and construed,

said Sec. 2, Art. 24, can refer only to rights of person and property not excluded by said Sec. 3 of Art. 1, and Sec. 45 of Art. 24, and the aforesaid sections of the Enabling Act, which accept and concede the jurisdiction and power of the government of the United States over the rights of persons and property of the Indians of said Territories.

Now, what laws are not "locally inapplicable?"

They are not the laws of Congress applicable to the rights of person and property of the Indians immediately before statehood, Congress was and is the exclusive judge of the laws best suitable to govern the Indians of said tribes and their property. Then the Acts of Congress in force before statehood were as applicable after statehood as before. The laws in force in Oklahoma Territory were inapplicable to the Indians and their property in the Indian Territory—the statutes of descent and distribution as well as others.

So it, therefore, follows that the opinion of the Supreme Court of the State of Oklahoma, holding:

> "That the Enabling Act, Section 13 of which provides 'that all laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said state, until changed by the legislature thereof.' And Section 21, which provides: 'And all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout the state, except as modified or changed by this Act, or by the Constitution of the State.' And the Constitution, Art. 25, Sec. 2, which provides: 'All laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended and remain in force in the State of Oklahoma until they expire by their own limitation, or are altered or repealed by law,' substituted for the laws of descent and distribution contained in Chapter 49 of Mansfield's Digest (as directed to apply in Sec. 6), the laws of descent and distribution of the Territory of Oklahoma."

conflicts and militates against said sections and that part of the provision in Section 1, which says:

> "Nothing contained in the *State Constitution* shall *be construed* to limit or impair the rights of person or property pertaining to the Indians in said territory, etc."

SECTION 6 OF THE ACT OF JUNE 30, 1902, SUPPLEMENTAL CREEK AGREEMENT, AND THE PROVISOS THEREIN ARE SPECIAL LEGISLATION; AND THE REVISED LAWS OF OKLAHOMA 1910, SECTIONS 8416, 8417, 8418, DO NOT CONTROL THE SUCCESSION OF THE CREEK ALLOTMENT OF PEGGY ANNE JEFFERSON HEREIN.

On November 15, 1907, the day immediately preceding statehood for Oklahoma, Section 6 of the Supplemental Creek Agreement spoke and read to the Government of the United States, its Indian wards and the Creek Nation as follows:

> "The provisions of the Act of Congress approved March 1, 1901 (31 Stat. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of the lands and money provided for by said Act shall be in accordance with Chapter 49, Mansfield Digest of the Statutes of Arkansas now in force in the Indian Territory: PROVIDED, THAT only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; AND PROVIDED FURTHER, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49."

On November 16, 1907, the date of statehood for Oklahoma, how did said Section 6 then read and speak to the government of the United States, its Indian wards and the Creek Nation under the opinion of the Supreme Court in this case.

The Court says:

> "That all laws in force in the territory of Oklahoma as far as applicable shall extend over and apply to said state until change of the legislature thereof."

And Section 21, which provides:

> "And all laws in force in the territory of Oklahoma at the time of the admission of the said state into the Union shall be in force throughout the state, except as modified or changed by this Act or by the Constitution of the state."

And Constitution, Article 25, of Section 2, which provides:

> "All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union which

are not repugnant to the Constitution, and which are not locally inapplicable shall be extended and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law. Substituted for the laws of descent and distribution contained in Chapter 49 of Mansfield's Digest (as directed to apply in Section 6) the law of descent and distribution of the territory of Oklahoma and left remaining in force as an exception thereto, the two provisos in question which survive and operate as such so far as applicable upon the laws of the territory thus put in force throughout the state." (Pages 25, 26, Record.)

Now Section 6 reads:

"The provisions of the Act of Congress approved March 1, 1901 (31 Stat. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation are hereby repealed and the descent and distribution of lands and money provided for by said Act shall be in accordance with 'the laws of descent and distribution of the territory of Oklahoma'; PROVIDED, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; AND PROVIDED FURTHER, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to the non-citizen heirs in the order named in said Chapter 49."

The Court proceeds further and says:

"And that, too, for another reason—Section 6 of the Supplemental Creek Agreement and the laws of descent and distribution of the territory thus put in force throughout the state were both Acts of Congress and *in pari materia*."

Here we have a special law, the proviso *in pari materia* is a general law, and Section 6 now reads:

"The provisions of the Act of Congress approved March 1, 1901 (31 Stat. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of lands and money provided for by said Act shall be in accordance with the laws of descent and distribution (the laws of descent and distribution of the Territory of Oklahoma); PROVIDED, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; AND PROVIDED FURTHER, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the

inheritance shall go to the non-citizen heirs in the order named in the laws of the State of Oklahoma."

The Court says:

"This is no novelty in construction."

In the case of *Washington* v. *Miller*, 235 U. S. 422, 50 L. Ed. 295, speaking of Section 6, it is said:

"On the other hand Section 6 of the Supplemental Creek Agreement and its two provisos dealt with that subject in specific and positive terms, which made it certain that the Creeks and their lands were particularly in mind at the time."

Now, with the highest respect for the Supreme Court of Oklahoma and its opinions, we are compelled, under the circumstances and in view of what has been said, to say that the opinion of the Supreme Court of Oklahoma is clearly erroneous, and fails to give full faith and credit to the decisions of this Honorable Court. As seen, the Indians, their lands and property, including the Creek allotment of Peggy Anne Jefferson, restricted lands in controversy (Section 4, Act March 1, 1901, *supra*), are under the authority and jurisdiction of the United States.

Tiger v. *Western Investment Company*, 221 U. S. 306-8; 55 L. Ed. 738-47, *supra.*

Furthermore, it is seen that the Indians, their lands and property, including the Creek allotment of Peggy Anne Jefferson, are under the control and subject to the Acts of Congress—the laws of the United States.

Ex Parte Webb, 225 U. S. 663, 56 L. Ed. 1248-56, *supra.*

Peggy Anne Jefferson and her heirs, some of whom are yet minors, were and are wards of the government, under the protection of the treaties and laws of Congress, Sections 6 and 16 of the Supplemental Creek Agreement, as well as other laws.

Bluejacket v. *Commissioners of Johnson Co.*, 72 U. S. 737-57, 18 L. Ed. 667.
U. S. v. *Kagama*, 118 U. S. 375-86.

If anything further were necessary to make doubly certain, that which is already certain, as to the intention of Congress, as expressed by and in the Enabling Act, such evidence is found in the

The opinion of the Supreme Court of Oklahoma is not in accord with the decisions of this Court on the questions indicated. We quote:

> "This for the reason that it is not true, as contended, that Peggy Anne inherited this allotment, one-half from her father, John J. Jefferson, Jr., and one-half from her mother, Mary Alice Jefferson. While heretofore we have indulged in fiction in construing the law governing devolution of Creek allotments, we have not gone so far as to hold that one can inherit from the living, and such we would do if we would here hold that this allottee, who received deeds to her allotment April 10, 1903, and filed for record April 17th, 1903, inherited any part of the land in controversy from her mother, who died June 8th, 1905; or any part from her father who is still living. And if we should so hold it might be difficult to say why the moiety thereof inherited from the mother should not be chargeable with the payment of the mother's debts in the hands of her administrator.
>
> And there is nothing in the case of *Shultis* v. *McDougal*, 170 Fed. 529, 95 C. C. A. 615, or any other case that we know of, which would justify such holding. It is contended that this case held Creek allotments to be ancestral estates, and it follows that this allotment was derived by inheritance from the father and mother of Peggy Anne Jefferson. Not so. To be true, the case holds the allotment to be a birthright, and comes to the allottee by the blood of his or her tribal parents, as the case may be, but that case far from holds that it comes thus by inheritance, but on the contrary does hold—
>
> 'The lands of that tribe fit into neither of the classes mentioned in the statute. (Reference being made to an ancestral estate and new acquisition.) They did not come to any member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase.'
>
> But why refine on the character of the estate to determine whether it is ancestral or not?"

Furthermore, the Supreme Court of Oklahoma, in the course of its opinion, says:

> "Section 6 of the Supplemental Agreement and the laws of descent and distribution of the territory thus put in force throughout the state were both acts of Congress *in pari materia*,"

and quotes Sections 8416, 8417, 8418 of the Revised Laws of Oklahoma, 1910.

Said sections of the Revised Laws of Oklahoma, 1910, and said sections are not an act or acts of Congress. They are the laws of the State of Oklahoma passed subsequent to the death of Peggy Anne Jefferson, which occurred on the 4th day of June, 1908. Said sections of the laws of 1910 are a revision of an act of the Legislature of Oklahoma, approved March 20th, 1909 (Ses. Laws. Okla. 1909, page 548), which were an amendment to Section 6261 of the Statutes of Oklahoma, 1893. So that neither the Session Laws of 1909, or the Revised Laws of 1910, were in force or effect, as the same now are, prior to the death of Peggy Anne Jefferson. Therefore, they have no application to the case at bar.

If the Enabling Act spread over the State of Oklahoma any law of descent or distribution of the territory of Oklahoma, it was Sections 6259, 6260 and 6261 of the Statutes of Oklahoma, 1893, from which we quote:

Succession.

"(6259) Succession is the coming in of another to take the property of one who dies without disposing of it by will.

(6260) The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the Probate Court, and to the possession of any administrator appointed by that court for the purpose of administration.

(6261) When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code and the chapter on Probate Court, subject to the payment of his debts, in the following manner:

First. If the descendant leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one

child living, and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.

Second. If the decedent leave no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father. If there be no father, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if he leave a mother also, she takes an equal share with the brothers and sisters. If decedent leave no issue, nor husband nor wife, the estate must go to the father.

Third. If there be no issue, nor husband, nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if a mother survive, she takes an equal share with the brothers and sisters.

Fourth. If the decedent leave no issue, nor husband, nor wife, nor father, and no brother or sister is living at the time of his death, the estate goes to his mother to the exclusion of the issue, if any, of deceased brothers or sisters.

Fifth. If the decedent leave a surviving husband or wife and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife.

Sixth. If the decedent leave no issue, nor husband, nor wife, and no father, nor mother, nor brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors must be preferred to those claiming through an ancestor more remote.

However:

Seventh. If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

Eighth. If, at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

Ninth. If the decedent leave no husband, wife or kindred, the estate escheats to the Territory for the support of common schools."

Now, if said statutes of the Territory of Oklahoma were spread over the state by the Enabling Act, and Art. 25, Sec. 2, of the Constitution of Oklahoma—a thing we deny—said allotment would pass under sub-division 7 of Sec. 6261 of the Laws of 1893, to the brothers and sisters of Peggy Anne Jefferson in the same manner as it would pass under Sec. 6 of the Supplemental Creek Agreement and the statutes of Arkansas embraced therein, both treated as Acts of Congress as they are by the Supreme Court of Oklahoma in its opinion herein.

The ancestral estates provided for by the said statutes of Arkansas are by gift, devise, and inheritance. Said section of the statutes of the Territory of Oklahoma provides for ancestral estate by inheritance only. So, the two statutes applicable to the case at bar provide alike for ancestral estate by inheritance, making the same provision in the same jurisdiction, regarding the same subject matter, and must receive the same construction; under either of the said deeds the lands of Peggy Anne Jefferson pass one-half to her father and one-half to her brothers and sisters.

Since this Court has already determined that Creek allotments are ancestral estates by inheritance. This being true, the Okla-

several Acts of Congress relevant to the same subject matter—the Indians and their property. These several enactments are:

By joint resolution of Congress passed March 2d, 1906, the tribal existence and government of this tribe, and of others, were "continued in full force and effect for all purposes under the existing laws, until all the property of such tribes, or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law." (34 Stat. 822.)

The Act of Congress of April 26th, 1906, providing for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and restrictions extended against alienation. (34 Stat. 137);

The Act of Congress of May 27th, 1908, providing for the removal of restrictions from part of the lands of the allottees of the Five Civilized Tribes which went into effect July 27, 1908. (35 Stat. 312);

The Act of June 25th, 1910, making appropriations to supply deficiencies in appropriations for the fiscal year 1910 (36 Stat. 774);

The Act of March 27th, 1914, providing drainage of Indian allotments of the Five Civilized Tribes (38 Stat. 310);

The Act of August 1st, 1914, providing for appropriation for the current expenses of the Bureau of Indian Affairs for fulfilling treaty stipulations with various tribes, and for other purposes (38 Stat. 582).

It, therefore, follows, that the Indians, their lands and property are not, in the Indian Territory, subject to the jurisdiction and laws of the State of Oklahoma, including the laws of descent and distribution.

The said Creek allotment of Peggy Anne Jefferson, out of tribal lands, are held and treated as an ancestral estate by inheritance—one-half from her father, John J. Jefferson, Jr., and one-half from her mother, Mary Alice Jefferson.

Schultis v. *McDougal*, 170 Fed. 529.
McDougal v. *McKay*, 237 U. S. 372, 59 L. Ed. 1001.
Pigeon v. *Buck*, and *Roberts* v. *Underwood*, 237 U. S.

Ancestral estates can be inherited only by persons of the ancestral blood. Here succession is dependent upon sources of intestate's title. The brothers and sisters of Peggy Anne Jefferson, plaintiffs in error, are of the blood of their mother—ancestral blood. It seems impossible for either the father, John J. Jefferson, or the brothers and sisters of Peggy Anne Jefferson, to take by succession the entire allotment of Peggy Anne Jefferson.

Oliver v. *Vance,* 34 Ark. 504.
Beard v. *Mozley,* 30 Ark. 517.
Campbell v. *Ware, 27* Ark. 65.
Galloway v. *Robinson,* 19 Ark. 396.
14 Cyc. 228.

So on the death of Peggy Anne Jefferson, her father, who was living, inherited one-half of her allotment. Her mother being then dead, the brothers and sisters of said Peggy Anne Jefferson, plaintiffs in error, inherited the other one-half of said allotment. John J. Jefferson was not of the blood of his wife, Mary Alice Jefferson, and could not inherit the one-half of said allotment which passed to the brothers and sisters of Peggy Anne Jefferson at her death.

Section 2531 of Mansfield's Digest of the Laws of Arkansas, in part, reads as follows:

> "In cases where the intestate shall die without descendants, if the estate came by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs."

The construction and interpretation of this section of Mansfield's Digest, and section 6 of the Supplemental Creek Agreement by Federal and State courts is to the effect that the estate of an enrolled full blood Creek citizen who dies intestate without descendants, after receiving a patent to her allotment, must be regarded as an ancestral estate within the meaning of the applicable provisions of Mansfield's Digest, Sec. 2531, under which on the death of the allottee without descendants, the estate, if it comes from the father, shall ascend to the father and his heirs; and if from the mother, to her and her heirs.

Pigeon v. *Buck, supra.*

homa statute, Sub-section 7, carries the same ancestral estate to the same persons as provided in the Arkansas statute named in Section 6, Supplemental Creek Agreement.

For the reasons indicated, we ask a reversal.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.

This is to certify that the undersigned have received a copy of the foregoing brief, and hereby accept service of the same.

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In the Supreme Court of the United States

OCTOBER TERM, 1917.

No. 242.

GRANT N. JEFFERSON, MATTIE R. WASSON et al., PLAINTIFFS IN ERROR,

versus

WILLIAM J. COOK et al., DEFENDANTS IN ERROR.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

JAMES M. HAYS,
JOHN T. HAYS,
Attorneys for Plaintiffs in Error.

Harlow—Okla. City

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REPLY BRIEF OF PLAINTIFFS IN ERROR.

MAY IT PLEASE THE COURT:

The defendants in error, hereinafter referred to as defendants, in brief abandon the premises upon which the Supreme Court of the State of Oklahoma predicated its opinion in this case.

We quote:

"The State Supreme Court reached the right result except as to the proviso barring non-citizens. With great deference to that court we doubt whether it was necessary to reason the matter out along the line followed by that court—involving the rules applicable to general laws and special laws, repeal, etc." (Page 74, answer brief.)

And:

"Whether or not the provisions engrafted upon the Arkansas law of descent by section six of the Supplemental Creek Agreement excluding non-citizens survived statehood and became a limitation

of the Oklahoma state law of descent is not involved in this case, and if it were involved we confess a grave doubt as to our ability to defend that part of the opinion of the state court because it appears to us that all laws of descent in force in the Creek Nation prior to statehood terminated upon the admission of the state * * * it being pretty well settled that the repeal of a law operates to repeal all provisos thereto." (Page 27, answer brief.)

The premises upon which the State Supreme Court predicated its opinion in the case at bar are by it stated thus:

"Rather are we of the opinion that the Enabling Act, section 13, which provides :

" 'That all laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply in said state until changed by the legislature thereof.'

and section 21, which provides:

" 'And all laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be enforced throughout the State except as modified or changed by this act or by the constitution of the state.'

and Constitution, article 25, section 2, which provides:

" 'All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union which are not repugnant to this Constitution and which are not locally inapplicable, shall be extended and remain in force in the State of Oklahoma until they expire by their own limitation, or are altered or repealed by law.'

"Substituted for the laws of descent and distribution contained in chapter 49 of Mansfield's Digest (as directed to apply in section 6) the laws of descent and distribution of the Territory of Oklahoma and left remaining in force as an exception thereto the two provisos in question which survive and operate as such so far as applicable

upon the laws of the territory thus put in force throughout the state." (Transcript of record, pp. 25-26.)

When the defendants abandoned the premises and grounds upon which the Supreme Court of Oklahoma predicated its opinion in this case, they thereby confess the error of said court in its opinion herein complained of. The position taken by defendants is: that the State Supreme Court reached the right result upon wrong grounds. They then proceed to offer the right grounds the State Supreme Court should have given for its opinion in this cause.

We now address ourselves to the argument by counsel for defendants in support of their new grounds offered in support of the opinion of the State Court.

"Point One," or Ground One, is thus stated at page 5, answer brief:

> "Peggy Ann Jefferson was at the time of her death on June the 4th, 1908, and had been from the date of the patent issued in April, 1903, vested with the legal and equitable title in fee."

Insofar as "the legal and equitable title in fee" is concerned, the plaintiffs and defendants, both as heirs or through heirs, claim title from Peggy Ann Jefferson. So "Point One" makes no issue in the manner and form stated.

Certainly it is a failure as a new ground and a good ground that the State Court should have given in support of its opinion in this case. We give it no further consideration.

Two.

"Point Two" of defendants' brief at page 6 reads:

> "Neither the Original nor Supplemental Creek Agreement is anything greater than a mere act of

> Congress and both of said Agreements obtain their force and efficacy from the acts of Congress approving them, and not from the consent of the Tribe, nor any of the negotiations between the Dawes Commission and representatives of the Tribe."

We submit that defendants' "Point Two" is no better than their "Point One"; that the argument in support of "Point Two" has no application to the facts involved in this case and is contrary to the argument in support of "Point One."

The argument in support of "Point One" is predicated upon the theory that the lands are allotted lands with the legal and equitable title in fee in Peggy Ann Jefferson. The argument in support of "Point Two" is predicated upon the theory that the lands are unallotted with the legal and equitable title in the Creek Nation. The first, individual property and rights; the second, tribal property and rights. The two propositions are directly opposite to each other. The laws applicable to each lie in different fields, at opposite poles and in different lines of decisions—without application to each other.

The argument of counsel for defendants in support of "Point Two" is grounded upon the case of *Gritts* v. *Fisher*, 224 U. S. 640, 648, and upon a single sentence in this case, which is:

> "The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when it is only an act of Congress, and can have no greater effect."

This sentence was spoken concerning Cherokee tribal property and funds and not concerning the individual property of a Cherokee citizen.

In the case of *Gritts* v. *Fisher, supra,* Justice Van-

Devanter, who delivered the opinion of the court, stated the question presented for decision thus:

> "The question presented for decision in this case is whether children born to enrolled members of the Cherokee Tribe of Indians, after September 1st, 1902, and living on March 4th, 1906, *are entitled to enrollment as members of the Tribe, and to participate in the allotments and distribution of its lands and funds now being made under the legislation of Congress.*"

Furthermore, in the course of the opinion, it is said:

> "We come, then, to the second contention. *It is not proposed to disturb individual allotments* made to members living September 1st, 1902, and enrolled under the act of 1902, and therefore we are only concerned with whether children born after September 1, 1902, and living on March the 4th, 1906, should be excluded from the allotment and distribution. * * * *As has been indicated their individual allotments are not affected.* * * * The difficulty with the appellant's contention is that it treats the act of 1902 as a contract, when it is only an act of Congress, and can have no greater effect. * * * It was but an exertion of the administrative control of the government over the *tribal property of tribal Indians,* and was subject to change by Congress *at any time before it was carried into effect and while the tribal relations continued.*"

Such is the law applicable to tribal property of tribal Indians while tribal relations continued; and while the United States is acting in its SOVEREIGN CAPACITY.

FOUR.

We now come to the individual allotments of the Creek allottee.

The Original and Supplemental Creek Agreement, Acts of March 1st, 1901, and June the 30th, 1902, are in the form of a contract, yet a law in the nature of a treaty with an Indian tribe which had for its object the dissolution and extinguishment of the Creek Nation and an allotment in severalty of its lands and funds to its members. In pursuance of these acts of Congress, deeds were issued to the individual Creek citizen. These deeds granted and gave to the enrolled Creek citizen a full legal title to the lands covered by his deeds. The issuance and delivery of the deeds to the Creek citizen extinguished and forever destroyed tribal title and tribal property in and to the lands described therein. The lands in controversy in this action are not *tribal property*, but *individual property*. They are the lands allotted to Peggy Ann Jefferson. There is a broad distinction between tribal property and private property, and the laws applicable to each.

In the case of *Choate* v. *Trapp*, 224 U. S. 664, 665, Justice Lamar speaking for the court says:

> "This sovereign and plenary power was exercised and retained in all the dealings and legislation upon which the lands of the Choctaws and Chickasaws were divided in severalty among the members of the tribe. For, although the Atoka agreement is in the form of a contract, it is still an integral part of the Curtis act, and, if not a treaty, is a public law *relating to tribal property* and as such was amendable and repealable at the will of Congress.
>
> "*But there is a broad distinction between tribal property* and *private property* and between the *power to abrogate a statute* and the *authority to destroy rights acquired under such law.*"

The broad distinction between tribal property and private property and between the power to abrogate a statute and the authority to destroy rights acquired

under such law, can be no better exemplified than by the case of *Gritts* v. *Fisher, supra,* where the United States was acting in its sovereign capacity, and *Choate* v. *Trapp,* just referred to, while the United States was acting as one of the contracting parties or in its indivual capacity. The former treating of tribal property and the power to abrogate a statute; the latter treating of private property and the authority to destroy rights acquired under law. These opinions were delivered on the same day, a fact not without significance.

The question involved in this case is not whether an act of Congress relating to tribal property can or cannot be amended, but whether or not the vested rights of Peggy Ann Jefferson acquired by her allotment deeds, executed in conformity to said original and supplemental Creek Agreement, are now protected by the Constitution of the United States. Hence, the case of *Gritts* v. *Fisher* and the arguments of defendants' counsel in support of "Point Two" has no application to the case at bar.

FIVE.

We are come to "Point Three" in defendants' brief. It reads:

> "The Supplemental Creek Agreement being a mere act of Congress is therefore subject to repeal by Congress at any time, the power of repeal being limited only to non-interference of vested rights."

This proposition falls under its own terms when "vested rights" are shown.

"Point Three," like "Point Two," and the argument in support of same is based upon the case of *Gritts* v. *Fisher, supra,* and is an argument addressed to tribal Indians and to tribal property, a subject here not involved. The property involved in this action is the al-

lotted lands of Peggy Ann Jefferson and the descent of the same.

When the Congress of the United States and the Creek Nation were considering the dissolution and extinguishment of the Creek tribal government and the allotment in severalty of its lands and money, they *agreed* and *stipulated* for *deeds* as the means for the divestiture and investiture of title to these lands and all other rights created and defined, allowed and provided for, by the said acts of Congress. The parties interested in tribal lands were:

First. The United States holding the reversionary interest;

Second. The Creek Nation holding the legal title;

Third. The Creek citizen holding an equitable interest.

After the execution, approval and acceptance of allotment deeds, the allottee became the owner and holder of the legal title of the Creek Nation, the reversionary interest of the United States and all other rights created and defined, allowed and provided for, in and to the lands described in the deeds. At the same time and by the terms of the same deeds, the allottee relinquished his equitable interest and all other rights in the remainder of the tribal property. So that when Peggy Ann Jefferson accepted her allotment deeds she acquired the reversionary interest of the United States, the title of the Creek Nation in and to the lands described in her allotment deeds together with all other rights created and defined, allowed and provided for, by the said acts of Congress; and at the same time she relinquished all her equitable interest and other rights in the remainder of the Creek Tribal lands.

By the terms of the said allotment deeds and by

mutual stipulation of the parties thereto, descent and distribution of said lands should be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas *then in force in the Indian Territory,* here the descent of these lands is fixed by the acts of the parties to the deeds.

Here we have valuable "vested rights" in and to the lands allotted to Peggy Ann Jefferson and under the language of defendants "Point Three" and the argument of their counsel in support of same, this proposition must fall as it has no application to the case at bar as the repeal is limited to "non-interference of vested rights."

SIX.

"Point Four" urged by counsel for defendants is:

> "Neither Peggy Ann Jefferson nor those persons named by the Arkansas law of descent as heirs, acquired any vested right in the Arkansas law of descent, or in the allotment in question, at any time during her life. No one has a vested right in the law of descent or inheritance. Upon the death of a citizen, title to his property passes under the law of descent in force at the date of death and the heirs named by the law in force at the date of death acquires a vested right in the property, but prior to death, no one has a vested right in the law of descent or inheritance."

"Point Four," like the preceding ones, is far from being applicable to the questions at issue. Here it is the contention of the defendant's counsel that the descent of the lands of Peggy Ann Jefferson were and are governed and controlled, by her said *allotment deeds,* but by the laws of descent and distribution of the State of Oklahoma, in force at the time of her death. This view of counsel for defendants, as to the descent of said lands is clearly error.

This error lies in the fact that counsel for defendants have failed to recognize the difference between the law, said acts of Congress of March 1st, 1901, and June 30th, 1902, and the said allotment deeds executed in conformity to them, and have failed to recognize the difference between the acts of the United States when acting in its sovereign capacity, and when acting in its individual capacity as one of the parties to a contract. In the former it is not bound—in the latter it is bound.

The law, said acts of Congress, created and defined the TITLE, the TAX EXEMPTION and the DESCENT OF LANDS AND MONEY of the Creek Nation, and also allows and provides how the *title*, the *tax exemption*, and the *descent of* the lands of the Creek Nation, may be granted and given to the enrolled Creek citizens, but it, the said law, does not grant or give them or either of them to the enrolled Creek citizen.

We think this proposition was finally and conclusively settled by this court in the case of *Sizemore* v. *Brady*, 235 U. S. 441, where it was contended that the Original Creek Agreement was in the nature of a *grant in praesenti* and invested every living member of the tribe, and the heirs of every deceased member, who had died after April 1st, 1899, with an *absolute right to an allotment of land*. As to this *contention*, this court said:

> "To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary *it contemplated that various preliminary acts and deeds were to precede any investiture of individual rights. The lands and funds to which it related were tribal properties, and only as it was carried into effect were individual claims to be fastened upon it.*"

It, therefore, follows that the law, said Original and Supplemental Creek Agreement, did not grant or

give *the title,* or the *tax exemption,* or *the descent of lands and money* of the Creek Nation, to the individual Creek citizen, but the law simply created and defined, allowed and provided how, after various "preliminary acts and deeds" *the title, the tax exemption* and the *descent of lands* and money might be acquired in and to the Creek tribal property by the enrolled Creek citizens and beneficiaries after death. These rights so created and defined, allowed and provided for, the enrolled Creek citizen and beneficiaries, after death take by the acts of the parties by operation of their allotment deeds, not by operation of law.

SEVEN.

The allotment deeds, executed in conformity to said acts of Congress of March 1st, 1901, and June 30th, 1902, granted and gave to each enrolled citizen of the Creek Nation the title, the tax exemption and the descent of lands and money created and defined by said acts of Congress. It was the allotment deeds of Peggy Ann Jefferson, dated March 12th, 1903, and approved April 10th, 1903, executed in conformity to said acts of Congress that granted and gave to her and beneficiaries after death, "the legal and equitable title in fee." (Point One of defendants.) The tax exemption and *the descnt of the lands described* in her said allotment deeds. Each of these, the title, the tax exemption, the descent of lands and money, is a valuable property right attached to the lands of Peggy Ann Jefferson by the terms and stipulations of her said allotment deeds. The consideration she gave for these valuable property rights was the relinquishment of her equitable interest in the remainder of the Creek tribal property, and so stipulated in her said deeds upon acceptance by her.

In the case of *Choate* v. *Trapp, supra,* this court further said:

> ***"The patent issued in pursuance of those statutes (Atoka Agreement) gave the Indian as good a title to the exemption (tax exemption) as it did to the land itself. Under the provisions of the fifth amendment there was no more power to deprive him of the tax exemption than of any other right in the property."***

It is here declared by this Honorable Court, that the patent GAVE THE TAX EXEMPTION to the Indian.

It, therefore, follows that the allotment deeds of Peggy Ann Jefferson granted and gave to her the title, the tax exemption and the descent of her lands; so allowed and provided for by the law, said acts of Congress.

EIGHT.

"Point Five" of defendants' brief is:

> "Upon admission of Oklahoma as a State, the Arkansas law of descent and distribution, same being laws of the United States, ceased to have any application to the devolution of allotments of the Creek citizens."

Defendants' "Point Five" and the argument of counsel in support of same is predicated upon the theory that the descent of lands and money belonging to Peggy Ann Jefferson at the time of her death are governed and controlled, not by the terms of her said allotment deeds, but by the law of descent and distribution of the State of Oklahoma in force at the time of her death.

It is difficult to understand how counsel for defendants can make such contention in the face of the law and against the expressed terms and stipulations of the allotment deeds of Peggy Ann Jefferson. Section 6 of the Supplemental Creek Agreement, act of Congress of

June 30th, 1902, among other things expressly stipulated that:

> "The descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas *now in force in the Indian Territory.*"

Here the law allows and provides what law shall govern and control the descent and distribution of the lands and money of Peggy Ann Jefferson at the time of her death. It is Chapter 49 of Mansfield's Digest of the Statutes of Arkansas *now (at the date of her allotment April 10th, 1903) in force in the Indian Territory.*

The Oklahoma law of descent and distribution, contended for by defendants' counsel, is a stranger to the descent of the lands of Peggy Ann Jefferson; it did not create the title, the tax exemption or descent of the lands of the Creek Nation. It did not designate the beneficiaries. It was not in the mind of the contracting parties at the time the deeds were executed.

The allotment deeds of Peggy Ann Jefferson are framed in conformity to section 6 of the Supplemental Creek Agreement of June 30th, 1902, as to descent and distribution of the lands of Peggy Ann Jefferson, at the time of her death. We quote:

> "Now, therefore, I, the undersigned, principal chief of the Muskogee (Creek) Nation * * * do grant and convey unto the said Peggy Ann Jefferson *all right, title and interest of said Nation in and to the following described land,* * * * subject, however, to the provisions of said act of Congress relating to the * * * *descent of said lands after the death of the said Peggy Ann Jefferson.*"

In the deeds as in the law, it is stipulated and agreed by the parties thereto and affected thereby, that Chapter 49 of Mansfield's Digest of the Statutes of

Arkansas (then) *now in force in the Indian Territory* shall govern and control the descent of said lands after the death of Peggy Ann Jefferson.

By no provision of said act of Congress, and by no terms of said allotment deeds, is it stipulated or agreed that the law of descent of the State of Oklahoma in force at the time of the death of Peggy Ann Jefferson shall govern or control the descent of her said lands. This, it would seem, should be sufficient reason why the Oklahoma law of descent and distribution has no application to the descent of the lands of Peggy Ann Jefferson which passed by the acts of the parties under the law that created and defined the rights.

The argument of defendants' counsel that the descent of the lands of Peggy Ann Jefferson are governed and controlled by the law of descent and distribution of the State of Oklahoma in force at the time of her death is predicated upon the theory that the United States and the Creek Nation as grantors, holding unlimited power of disposition over Creek lands, cannot stipulate and agree *who shall take the lands* of Peggy Ann Jefferson *after her death.* This is adverse to the rulings of this court in the cases cited in brief of defendants' counsel.

By the provisions of the said act of Congress and the terms and stipulations of said allotment deeds, there is no purpose exhibited or here contended for by plaintiff's counsel that the law of descent in force at the time the patent was issued should run with the lands and become an irrepealable law.

The purpose of said law and the stipulations of said deeds are to govern and control the FIRST DEVOLUTION *of the lands* of Peggy Ann Jefferson and no other.

The contention of plaintiffs' counsel is:

That the said allotment deeds dispose of all of these lands on the death of Peggy Ann Jefferson. That is: The descent of these lands was fixed by the acts of the parties;

The allotment deeds of Peggy Ann Jefferson are written contracts binding upon the grantors and grantee alike. The grantors are estopped to deny or change beneficiaries or heirs designated therein. Among the definitions of a deed given by Cyc., Vol. 13, page 519, are these:

> "A written instrument under seal, containing a contract or agreement, which has been delivered to the party to be bound and accepted by the obligee or covenantee";
>
> "A contract in writing under seal";
>
> "A writing containing a contract sealed and delivered by the party thereto."

That the allotment deeds of Peggy Ann Jefferson are written contracts binding upon all the parties thereto has been fully and finally settled by this court in the case of *Choate* v. *Trapp, supra,* we read:

> "The case was carried to the Supreme Court of the State which held that Oklahoma was not a party to any contract with the Indians; that the United States, by virtue of its governmental power over the Indians, could have substituted title in severalty for ownership in common without plaintiffs' consent, and that, for want of consideration, the provision that the land should be non-taxable was not a contract but a mere *gratuity,* which could be withdrawn at will. The court thereupon overruled plaintiffs' contentions that they had a vested right of exemption which prevented the State from taxing the land at this time, and dismissed their suit.
>
> "* * * The individual Indian had no title or enforcible right in the tribal property, but as one of those entitled to occupy the land, he did have an equitable interest, which Congress recognized, and which it desired to have satisfied and extinguished. The Curtis act was framed with a view of having

every such claim satisfactorily settled, and though it provided for a division of land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim in the other property of the tribe formerly held for their common use. For the Atoka Agreement, after declaring that all land alloted should be non-taxable, stipulated further that, each enrolled member of the tribe should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement, and to relinquish all his rights in the property formerly held in common. There was here then an offer of non-taxable land. Acceptance by the party to whom the offer was made, with a consequent relinquishment of all claim to other lands, furnished a part of the consideration, indeed, if any was needed, in such a case, to support either the GRANT or the EXEMPTION. * * *"

"Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with *all the rights conveyed by the patent.*

"Like a grantee in a deed poll or a person accepting the benefits of a conveyance, bound by its terms, although it was not actually signed by him."

The Indian or the allottee, Peggy Ann Jefferson, being vested with:

"All the rights conveyed by the patent is vested with a right of descent of her lands under Chapter 49 of Mansfield's Digest. The law that created and defined, allowed and provided for, the title and the tax exemption, in equally positive terms created and defined, allowed and provided for the descent of the lands under Chapter 49 of Mansfield's Digest."

The allotment deeds that granted and gave the title and tax exemption also in equal and positive language granted and gave the descent of lands of Peggy Ann Jefferson, under said Chapter 49 of Mansfield's Digest.

The descent of these lands is one of the obligations of the contracts or deeds. The descent of these lands is a "vested right," protected by the Constitution of the United States in the same way and to the same extent as the title and tax exemption. These rights remain after statehood as before.

NINE.

Did the Arkansas law of descent and distribution, same being the laws of the United States, cease to have any application to the devolution of allotments of the Creek citizens upon the admission of Oklahoma as a State? We answer no.

Article 6, section 1, of the Constitution of the United States provides:

> "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under authority of the United States, shall be the supreme law of the land, and the judges in each state shall be bound thereby; anything in the constitution and laws of any state to the contrary notwithstanding."

The acts of March 1st, 1901, and June 30th, 1902, are acts of Congress, enacted under constitutional authority, relating to subject matter and persons within the exclusive jurisdiction of the United States, both before and after statehood. *Ex parte Webb*, 56 L. Ed. 1248. These acts of Congress are a part of the supreme law of the land after statehood as before.

The State of Oklahoma by article 1, section 1, of its Constitution declares:

> "The State of Oklahoma is an inseparable part of the federal Union and the Constitution of the United States is the supreme law of the land."

This declaration includes the said acts of Congress

of March 1st, 1901, and June 30th, 1902, the Original and Supplemental Creek Agreements.

In the case of *Hauenstein* v. *Lynham*, 100 U. S. 628, this court said:

> "That the Constitution, laws and treaties of the United States are as much a part of the laws of each state as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity."

So that the Constitution of the United States and the said acts of Congress are a part of the laws of the State of Oklahoma. They are its supreme law unaffected by its constitution and local laws, including its schedule and section 2 thereof.

The said acts of Congress, the Original and Supplemental Creek Agreements, remained after statehood as acts of Congress, and as a part of the supreme law of the State of Oklahoma, applicable to the lands of Creek allottees to govern and control the descent of allotted lands after the death of allottees, just as the laws of descent and distribution of the State of Oklahoma govern and control the descent of the lands of the other inhabitants of the state.

It therefore follows "that statehood in and of itself *did not operate ipso facto*, or at all, to terminate all laws of the United States in force in the Indian Territory—in the Creek Nation particularly—pertaining to the disposition by deed, will or descent of unrestricted lands allotted to Creek citizens, and like lands of the citizens of all the other tribes," and did not terminate section 6 of the Supplemental Creek Agreement.

A reversal is respectfully asked.

JAMES M. HAYS,
JOHN T. HAYS,
Attorneys for Plaintiffs in Error.

This is to certify that the undersigned have received a copy of the foregoing brief, and hereby accept service of the same.

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No. 242.

In the

Supreme Court of the United States.

October Term, 1917.

GRANT N. JEFFERSON, MATTIE R. WASSON, *et al.*, - - - - - - - - - - - *Plaintiffs in Error,*

VERSUS

WILLIAM J. COOK, *et al.*, - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR DEFENDANTS IN ERROR.

GEO. S. RAMSEY,
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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1917.

No. 242.

GRANT N. JEFFERSON, MATTIE R. WASSON, *et al.*, - - - - - - - - - - *Plaintiffs in Error,*

vs.

WILLIAM J. COOK, *et al.*, - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT
OF THE STATE OF OKLAHOMA.

BRIEF *and* ARGUMENT *for* DEFENDANTS *in* ERROR.

May It Please the Court:

As plaintiffs in error were plaintiffs below we shall refer to the parties as plaintiffs and defendants.

The land involved was the allotment of Peggie Ann Jefferson, an enrolled Creek freedman; she died intestate on June 4, 1908, seized and possessed of

the legal and equitable title in said land; patents were issued to her in 1903 and approved by the Secretary of the Interior. Plaintiffs contend that chapter 49 of Mansfield's Digest of the laws of Arkansas in force in the Indian Territory prior to statehood governs the devolution of the allotment, and if that be true, the defendants concede the plaintiffs are entitled to recover an undivided one-half interest in the land.

We contend that the Oklahoma law of descent controls, and if that be true the plaintiffs are entitled to recover nothing.

As we gather it, plaintiffs' contention is that the land in question having been allotted to Peggie Ann Jefferson under the terms of the Original Creek Agreement (31 Stat. L. 861), and the terms of the Supplemental Creek Agreement (32 Stat. L. 500), and fee simple title having been vested in her by patent issued in 1903, the law of descent prescribed by section 6 of said Supplemental Creek Agreement (Appendix, p. 2; 32 Stat. L. 500) is written into the patent by implication, and that taking the two agreements together with the patent a contract was thereby entered into between the United States, party of the first part, the Creek Nation, party of the second part, and Peggie Ann Jefferson, the allottee, party of the third part, whereby it was agreed between the

three that the Arkansas law of descent should control the devolution of the allotment no matter when Peggie Ann Jefferson died, and that by such covenant between the aforesaid three parties the Arkansas law of descent was perpetually put in force and therefore became an irrepealable law of descent.

On page 35 of brief of opposing counsel they state their position as follows:

> "We insist on behalf of the said plaintiffs that no change could be made in the terms and conditions of which descent and distribution are one, in the said contract and Act of Congress, between Peggy Anne Jefferson on the one side and the United States and the Creek Nation on the other, without the consent and approval of the said Peggy Anne Jefferson; *first*, because the said Acts of Congress and the said deeds of conveyance, together with all the terms thereof, of which descent and distribution are a part, is a contract between Peggy Anne Jefferson of the one part and the United States and the Creek Nation of the other part; *second*, because the land conveyed by the aforesaid deeds of conveyance was the individual and private property of Peggy Anne Jefferson from the date of the execution and approval of the said deeds; *third*, because any Act of Congress, such as would change any of the terms or conditions of the said contract between the United States and the Creek Nation of the one part and Peggy Anne

Jefferson of the other part, without the consent and approval of the said Peggy Anne Jefferson, would be in violation of, and contrary to the terms and conditions of said contract and in violation of that clause of the Constitution of the United States which provides, 'No person shall be deprived of property without due process of law.' (Art. 5, Bill of Rights.)

"The deeds of conveyance aforesaid, and the aforesaid Acts of Congress, known as the Original and Supplemental Creek Agreements, constitute one contract and must be construed together as one and a single agreement.

"This contract was made not only to cover the present condition, but *provided for future* events. The contract looking both to the present and to the future, provided for deeds of conveyance and for the descent and distribution of the estate after the death of said Peggy Anne Jefferson and a disposal of her private property by the terms of said deeds above quoted. Under the terms of the contract a preference right is given to the Creek citizens and their Creek descendants, designated and named by and under the terms of the contract and under the aforesaid sections of Mansfield's Digest above referred to, as a part thereof.

"It is as beneficiaries under said contract that the plaintiffs assert their rights in this court to said property, to-wit: An undivided one-half interest in and to said allotment of Peggy Anne Jefferson." (Italics ours.)

Defendants contend that upon the admission of Oklahoma as a state on November 16, 1907, the Oklahoma laws of descent controlled the devolution of the allotment, and without any qualifications with respect to non-citizens or any other limitations formerly in existence prior to statehood.

Point One.

Peggie Ann Jefferson was at the date of her death on June 4, 1908, and had been from the date of the patent issued in April, 1903, vested with the legal and equitable title in fee.

This proposition is not controverted by plaintiffs' counsel and has never been denied. These lands were not patented in trust, and upon the selection of the allotment and the subsequent issuance of patent the title in fee vested in the allottee free from any proprietary interest in the United States or the Creek tribe.

Section 23 of the Original Creek Agreement (31 Stat. L. 861) expressly provides that the patent or deed issued to the allottee shall convey "to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate," and that "all conveyances shall be approved by the Secretary of the Interior,

which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed."

That Creek allottees, upon the issuance of patents, became vested with the fee simple title, is recognized by this court in *Tiger* v. *Western Investment Company,* 221 U. S. 286-316, wherein on page 316 the court said:

> "The inherited lands, though otherwise held in fee, were inalienable without the consent of the Secretary of the Interior, until August, 1907, by virtue of the Act of Congress."

That fee simple title passed, see:

Bartlett v. *U. S.,* 203 Fed. 410;
Heckman v. *U. S.,* 224 U. S. 413;
Goat v. *U. S.,* 224 U. S. 458.

That restrictions against alienation did not debase the title below a fee simple, see:

Libby v. *Clark,* 118 U. S. 250-255;
Scrimpscher v. *Stockton,* 183 U. S. 290-299.

Point Two.

Neither the Original nor Supplemental Creek Agreement is anything greater than a mere Act of Congress, and both of said agreements obtained their

force and efficacy from the Acts of Congress approving them, and not from the consent of the tribe, nor any of the negotiations between the Dawes Commission and representatives of the tribe.

The plaintiffs' contention that the two Creek Agreements constituted contracts between the United States, the Creek Nation and the individual allottee immune to subsequent amendment or repeal by Congress, has been adversely passed upon by this court in a number of cases.

In *Gritts* v. *Fisher*, 224 U. S. 640, 648, this court said, in reference to the Cherokee Agreement of 1902, that: "The difficulty with the appellants' contention is that it treats the Act of 1902 as a contract, when 'it is only an Act of Congress and can have no greater effect'." In *Redbird* v. *United States*, 203 U. S. 76-93, 51 L. ed. 96, this court expressly held that the Cherokee Agreement of 1902 was nothing more than an Act of Congress, and had no greater effect, and of course the same is true as to the so-called Creek Agreements. See also:

Sizemore v. *Brady*, 235 U. S. 441;
Stephens v. *Cherokee Nation*, 174 U. S. 488;
Brann v. *Bell*, 192 Fed. 427;
McKee v. *Henry*, 201 Fed. 74.

Then section 10 of article 1 of the Federal Constitution imposes no limitations upon the power of the Federal Government to impair the obligations of contracts.

—*Mitchell* v. *Clark*, 110 U. S. 633-643, 28 L. ed. 279;

Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287;

Beach on Contracts, Sec. 1633;

Evans-Snider-Buel Co. v. *McFadden*, 105 Fed. 297.

While as a general rule the law in force at the time a contract is made becomes a part of the contract, nevertheless, the law of descent in force at the time a deed or patent is executed, has never been treated as written into the deed or patent by implication and made a part thereof. If the contention of plaintiffs be sound, then the law of descent in force at the time the public lands in this country were granted to the various entrymen, donees, etc., became a part of the patent and is irrepealable. No such contention has ever been made.

Further, there is no provision in either the Original or Supplemental Agreement prescribing the form of the patent to be issued to the allottee. Section 23 of the Original Creek Agreement (31 Stat. L. 861) merely requires the Secretary to furnish the

Principal Chief of the tribe with blank deeds, but neither the Secretary nor the chief of the tribe had any authority to embody any term, provision or stipulation in the patent not authorized by law, and the patent is no broader than the Acts of Congress under which it is issued, and there is not a single word in either the Original or Supplemental Creek Agreement, or any subsequent Act of Congress declaring that the law of descent in force at the time the patent was issued should run with the land and become an irrepealable law. No such idea ever entered the minds of any one. Of course all the provisions in the patent not authorized by law are void.

—*U. S.* v. *Saunders,* 96 Fed. 268.

It is inconceivable that either Congress or the Creeks intended to perpetuate the Arkansas law of descent by incorporating that law in the patent, and if there were such provisions they would be void.

Point Three.

The Supplemental Creek Agreement being a mere Act of Congress was therefore subject to repeal by Congress at any time, the power of repeal being limited only to non-interference with vested rights.

In *Gritts* v. *Fisher,* 224 U. S. 648, this court, in discussing the Act of Congress of April 26, 1906, as

amended June 21, 1906, and its effect on the Act of Congress of 1902, known as the Cherokee Agreement, said:

> "It was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued."

An able discussion of the power of Congress to repeal the agreements made with the nations constituting the Five Civilized Tribes will be found in the opinion of Circuit Judge SANBORN in *Wallace* v. *Adams,* 143 Fed. 716, affirmed by this court in 204 U. S. 415, 51 L. ed. 547.

The direct question was again passed on by this court in *Tiger* v. *Western Investment Company,* 221 U. S. 286, in sustaining the constitutionality of section 22 of the Act of Congress of April 26, 1906, extending the period of the restrictions against alienation by full-blood heirs.

There was no territorial government in force in the Indian Territory, Congress exercising its legislative control directly, and as said by this court in *Late Corporation of Latter-Day Saints* v. *United States,* 136 U. S. 1-68, 34 L. ed. 490:

"The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Prior to the admission of Oklahoma as a state Congress possessed supreme and s o l e legislative power over all persons and property within the Indian Territory irrespective of the race of the inhabitants and citizens. The Indian Territory was not an organized territory like Oklahoma Territory. That Congress had plenary power over the Creek Nation to the fullest extent up until Oklahoma was admitted as a state, and still retains a qualified jurisdiction over full-bloods and certain mixed-blood Indian citizens of the tribe, has been settled by this court.

—*Tiger* v. *Western Investment Co.*, 221 U. S. 286;
Heckman v. *United States*, 224 U. S. 413;
Goat v. *United States*, 224 U. S. 458;
Lone Wolf v. *Hitchcock*, 187 U. S. 553;
Hallowell v. *United States*, 221 U. S. 317.

We know of no instance in the history of this country where the Federal Government when it had jurisdiction, or any state where it had jurisdiction,

ever undertook to surrender and divest itself of its sovereign power to prescribe or repeal a law of descent, and it would certainly be a remarkable departure from the history of this Government if Congress, in the face of its intention announced in section 16 of the act approved March 3, 1893 (27 Stat. L. 645), to ultimately create a state "which shall embrace the lands within said Indian Territory" including of course Creek lands, entered into any treaty or covenant with the Creek Nation as a political entity, or any of its citizens, whereby it divested itself, and any state subsequently admitted, of the power to legislate on the subject of descent in the Creek Nation. In the first place Congress could not divest itself of its sovereignty to prescribe or repeal a law of descent in the Creek Nation; and Congress could not enter into any compact with the Creek tribe, or the Creek citizens, which would deprive the sovereign State of Oklahoma upon its admission of the power to prescribe or repeal the laws of descent controlling the devolution of lands within this state. It is well settled that neither Congress nor the legislature can pass an irrepealable law.

Cooley on Constitutional Limitations, p. 174, says:

> "To say that the legislature may pass irrepealable laws, is to say that it may alter the

very constitution from which it derives its authority; since, insofar as one legislature could bind a subsequent one by its enactments, it could in the same degree reduce the legislative power of its successors; and the policy might be repeated until one by one the subjects of legislation would be excluded altogether from their control, and the constitutional provision that the legislative power shall be vested in two houses would be to a greater or less degree rendered ineffectual."

The Original Creek Agreement approved by Act of Congress of March 1, 1901 (31 Stat. L. 861), sections 7 and 28 thereof, put in force the Creek law of descent and distribution.

—*Woodward* v. *deGraffenried*, 238 U. S. 284; *deGraffenried* v. *Iowa Land & Trust Co.*, 20 Okla. 687.

If the position of plaintiffs' counsel in this case be correct, then the Creek law of descent became an irrepealable law because it was put in force by the mutual consent of Congress and the Creek tribe. Yet, this court in *Sizemore* v. *Brady*, 235 U. S. 441, and the Court of Appeals in *McKee* v. *Henry*, 201 Fed. 74, held that the Act of Congress of May 27, 1902 (32 Stat. L. 445), putting in force the Arkansas law of descent in the Creek Nation operated to repeal the Creek law of descent, the Arkansas law of descent be-

coming operative on July 1, 1902, as per joint resolution of Congress. The Creek law of descent was put in force by the Original Creek Agreement. See:

Thomas' Annotated Acts of Congress, Five Civilized Tribes and Osage Nation, p. 303;

de Graffenried v. *Iowa Land and Trust Co.*, 20 Okla. 687.

Were we to assume that the Supplemental Creek Agreement arose to the dignity of a treaty with a foreign power, yet this court has settled in a number of cases the right of Congress to "pass any law, otherwise constitutional, notwithstanding it conflicts with an existing treaty with a foreign nation."

In *United States* v. *Lee Yen Tai*, 185 U. S. 221, this court approvingly quotes from *Whitney* v. *Robertson*, 124 U. S. 190-194, as follows: "By the Constitution a treaty is placed on the same footing and made of the like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other." And in *Ward* v. *Race Horse*, 163 U. S. 512, this court said that "a treaty may supersede a prior Act of Congress and an Act of Congress supersede a prior treaty" is elementary.

That a treaty is subject to repeal, see:

Rainey v. *U. S.*, 232 U. S. 310;

Fong Yue Ting v. *United States*, 149 U. S. 698;
The Cherokee Tobacco, 11 Wall. 616;
Chinese Exclusion Case, 130 U. S. 589;
Thomas v. *Gay*, 169 U. S. 271.

Point Four.

Neither Peggie Ann Jefferson, nor those persons named by the Arkansas law of descent as her heirs, acquired any vested right in the Arkansas law of descent, or in the allotment in question, at any time during her lifetime. No one has a vested right in the law of descent or inheritance. Upon the death of a citizen title to his property passes under the law of descent in force at the date of death, and the heirs named by the law in force at the date of death acquired a vested right in the property, but prior to death no one had a vested right in the law of descent or inheritance.

In *Jones* v. *Jones*, 234 U. S. 618, this court said: "Inheritance is governed by the *lex rei sitæ*. It is not a natural or absolute right, but the creation of statute law." And, in *Dawson* v. *Godfrey*, 4 Cranch 421, 2 L. ed. 634, this court said "that the right to inherit is not a natural and perfect right, but has its origin in and is modified to infinity by the laws of

society." And in *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 42 L. ed. 1037, the court said "that one of the principles upon which was based the authorities upholding the constitutionality of inheritance tax was that the right to take property by devise or descent is a creature of law and not a natural right, but is a privilege." In *Wallace* v. *Myers*, 38 Fed. 184, the court said: *"That it is lawful for the state to withhold altogether the privilege of acquiring property within its dominion by will or inheritance."* And *In re Stanford*, 126 Cal. 112, 58 Pac. 462, the court said: "That the right of inheritance was entirely a matter of statutory enactment and within the control of the legislature, and that it was only by virtue of the statute that an heir was entitled to receive any of his ancestor's estate." And, *In re Speed*, 216 Ill. 23, 74 N. E. 809, the court said that *"No man can inherit property or take by devise or bequest except by statute, and therefore such right may at any time be abrogated by the same power that created it."* And, in *Ferry* v. *Campbell*, 110 Iowa 290, 81 N. W. 604, the court said that the right of inheritance is a creature of law "and that there is nothing in the fundamental law of the state to prevent the legislature from taking away or limiting such rights."

Cooley on Constitutional Law, p. 512, and Black on Constitutional Law, p. 495, both state these ele-

mentary principles and say that "no one is heir to the living," and that an heir prior to the death of his ancestor has a mere expectation which is not a vested right but subject at all times to repeal by the legislature prior to the death of the ancestor, and that the law of descent is nothing more than a promise or declaration of the legislature as to its present view of public policy as regards the proper order of succession—a view which it may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. All the authorities lay down the rule that "the expectation to become an heir is not property, and that no one has a vested right in the law of descent—that property rights only vest upon the death of the ancestor and not before."

The decision of the Supreme Court of New Hampshire in *Merrill* v. *Sherburne,* 1 N. H. 199, 8 Am. Dec. 52, 64, is a leading case on constitutional law. With respect to the power of the legislature, Justice WOODBURY said:

> "Nor can acts of the legislature be opposed to those fundamental axioms of legislation before particularized, unless they impair rights which are vested; *because most civil rights are derived from public laws;* and if, before the rights become vested in particular individuals, the convenience of the state produces amend-

ments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke, before an interest is perfected in the donee. Thus the right to prosecute actions in a particular time or manner, may perhaps be modified or taken away at any period before actions are commenced; 10 Mass. 439. So, also, may the rights of *femes covert* to dower at any period before the death of their husbands; *and so the right of the next akin to a relation's estate, at any period before the relation's death.*"

—*Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969;

Plumber v. *Coler*, 178 U. S. 115, 44 L. ed. 998;

8 Cyc 892;

Words and Phrases, Vol. 8, p. 7307;

Richardson v. *Akin*, 87 Ill. 138;

Wistar v. *Foster*, 46 Minn. 484, 24 Am. St. Rep. 241;

Drehman v. *Stifel*, 41 Mo. 184, 97 Am. Dec. 268-273;

Crane v. *Reeder*, 21 Mich. 24;

In re Sherman, 153 N. Y. 1, 46 N. E. 1032;

Pullen v. *Wake County*, 66 N. C. 361;

Strode v. *Commonwealth*, 52 Pa. 181.

If the Act of Congress approved March 1, 1901 (31 Stat. L. 861), known as the Original Creek Agreement, putting in force the Creek law of descent, did

not become an irrepealable law, as held by this court in *Sizemore* v. *Brady*, 235 U. S. 441, and by the Court of Appeals in *MeKee* v. *Henry*, 201 Fed. 74, then it is hard to understand how the Supplemental Creek Agreement putting in force the Arkansas law, became an irrepealable law. *Congress could not divest itself of its sovereign power to legislate upon the subject of descent in the Indian Territory or the Creek Nation so long as said territory was not incorporated in a state or admitted as such.*

Point Five.

Upon the admission of Oklahoma as a state the Arkansas laws of descent and distribution, same being laws of the United States, ceased to have any application to the devolution of allotments of Creek citizens.

This involves the question as to whether or not section 6 of the Supplemental Creek Agreement (32 Stat. L. 500) putting in force the Arkansas law of descent in the Creek Nation, was superseded by the laws of the State of Oklahoma. Section 6 of the Supplemental Creek Agreement is as follows:

> "The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are

hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided,* That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And *provided further,* That if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

The Arkansas laws of descent embodied in chapter 49 of Mansfield's Digest of Arkansas immediately upon their adoption by Congress became *Federal laws and should be treated and construed as if all sections of chapter 49 of Mansfield's Digest had been copied into the Act of Congress verbatim and enacted in that style.*

—*Leak Glove Manuf'g Co.* v. *Needles,* 69 Fed. 68.

The Oklahoma Enabling Act (34 Stat. L. 267) contains the following in the last three lines of section 13 thereof, to-wit, "and that the laws in force in the Territory of Oklahoma as far as *applicable,* shall extend over and apply to said state until changed by the legislature thereof." And the last few lines of section 21 of said Enabling Act are as follows: "and

all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the constitution of the state, and *the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States.*"

The Enabling Act was approved June 16, 1906, and under its provisions the Territory of Oklahoma and the Indian Territory elected representatives to a constitutional convention, which formulated a constitution which was ratified and the State of Oklahoma admitted into the Union on November 16, 1907.

Sections 1 and 2 of said Enabling Act contain provisions pertinent to the solution of this question. Section 1 is as follows:

> "*Provided,* That nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the *Indians* of said territories (so long as such rights shall remain unextinguished) *or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise,* which it would have been com-

petent to make if this act had never been passed." (Italics ours.)

The pertinent part of section 2 is as follows:

"That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any *Indian Nation or tribe in said Indian Territory* and Oklahoma, and who have resided within the limits of said proposed state for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state; *and all persons qualified to vote for said delegates shall be eligible to serve as delegates.*"

We contend:

(a) That statehood in and of itself operated *ipso facto* to terminate all the laws of the United States in force in the Indian Territory—in the Creek Nation particularly—pertaining to the disposition by deed, will or descent of unrestricted lands allotted to Creek citizens and like lands of the citizens of all the other tribes;

(b) That the laws of descent in force in the State of Oklahoma obtained their efficacy from section 2 of the Schedule to the Oklahoma Constitution, which is as follows:

"All laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law."

(c) That Congress had no power under the Enabling Act to put in force in the State of Oklahoma any law of descent, and that the above quoted provisions of sections 13 and 21 of the Enabling Act purporting to put in force in the state all the laws of the Territory of Oklahoma amounted to nothing more nor less than an expression of the consent of the United States that the two territories might be organized into a state and admitted as such into the Union; that the Federal Government is a Government of enumerated powers; that the people of the United States have not delegated to the Federal Government any authority to prescribe a law of descent controlling the devolution of the land and property within a state except Indian tribal lands still subject to Federal control; that Oklahoma was admitted into the Union upon an equality with all the other states and has the same sovereign power of the original thirteen states;

(d) That reverting to the above quoted part of section 21 of the Enabling Act declaring that "the

laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within said Union," must be construed in the light of the decisions of this Court as a declaration by Congress that it did not intend to retain in force in the Creek Nation or in the Indian Territory any laws of the United States with respect to any subject upon which Congress could not otherwise legislate after the admission of Oklahoma as a State;

(e) That the quoted provisions of section 1 of the Enabling Act declaring that the admission of Oklahoma as a State shall not "limit or affect the authority of the Government etc.," had no efficacy as a delegation or reservation of Federal jurisdiction because the powers of the Federal Government cannot be enlarged by any compact between one State and the Federal Government, it being obvious that the Constitution of the United States cannot be amended by agreement between one State and the Federal Government. In other words, we think the Federal Government has authority to legislate upon the subjects specified in section 1 of the Enabling Act without the necessity of resorting to the provisions of that section. Section 1 is in reality nothing more than a recognition upon the part of Oklahoma that the Federal Government has certain powers over certain subjects in all states.

(f) That it must be conceded that upon the admission of the State all unrestricted lands of Creek tribal allottees became subject exclusively to the sovereignty of the state and that the Federal "Government had no further interest in or control over the lands" as said by this Court in *U. S.* v. *Waller*, 243 U. S. 452, and consequently the unrestricted lands in the Creek Nation became subject to the exclusive sovereignty of the state the same as the lands of white people, and that the Oklahoma law of descent controls the devolution of their lands without any reference to either chapter 49 of Mansfield's Digest of the Laws of Arkansas or the proviso to section 6 of the Supplemental Creek Agreement excluding non-citizens from inheriting Creek allotments;

(g) That it has long been the established policy of the Federal Government in respect to the allotted lands of Indians still under the control and guardianship of the United States to subject their allotments to the laws of descent in force in the state in which the allotment is situated.

(h) That prior to and upon the admission of Oklahoma as a state there were many thousands of acres of lands of Creek citizens from which all restrictions against alienation had been removed; that there were many thousands of acres upon which the restrictions expired upon the death of the allottee;

and that it was the evident purpose of Congress that the state laws of descent should control the devolution of the allotments of all citizens of all the tribes irrespective of whether the lands were restricted or not restricted at the time Oklahoma was admitted, and if this be not true, then under the provisions of Secs. 4 and 9 of the Act of Congress of May 27, 1908, (35 St. L. 312) the Oklahoma law of descent became operative with respect to all the lands upon which restrictions against alienation had not been removed or *were removed* by that act or continued in force by that act.

ONE.

All the laws of the United States regulating the descent and distribution of citizens of the Five Civilized Tribes, same being found in chapter 49 of Mansfield's Digest of the laws of Arkansas, qualified, so far as the Creeks were concerned, by the provisions of section 6 of the Supplemental Creek Agreement excluding non-citizens, were terminated by the admission of Oklahoma as a state in so far as all allotted lands free from restrictions against alienation were concerned, and all unrestricted lands became subject exclusively to the laws of the state pertaining to their disposition by will, lease, deed and descent.

The State Supreme Court in this case held that statehood terminated the Arkansas Laws of descent

but did not terminate the provisions in section 6 of the Supplemental Creek Agreement excluding non-citizens. Whether or not the provisions engrafted upon the Arkansas law of descent by section 6 of the Supplemental Creek Agreement excluding non-citizens survived statehood and became a limitation upon the Oklahoma State law of descent is not involved in this case, and if it were involved we confess a grave doubt as to our ability to defend that part of the opinion of the State Court because it appears to us that all the laws of descent in force in the Creek Nation prior to statehood terminated upon the admission of the state. If the Arkansas law was extinguished by statehood, it appears clear that the proviso engrafted upon the Arkansas law by section 6 of the Supplemental Agreement also terminated, it being pretty well settled that the repeal of a law operates to repeal all provisos thereto.

Black on Interpretation of Laws, p. 271, says that "The proviso is a subsidiary and dependent part of the statute, or of the section to which it is appended. Hence, when a statute with a proviso is repealed, the proviso will fall with the statute; it will not continue in force as an independent enactment."

The land involved in this case was allotted to a Creek freedman—a person not of Indian blood, who died while still an infant on June 4, 1908.

Section 16 of the Supplemental Creek Agreement approved by Act of Congress of June 30, 1902, superseded the provisions of section 7 of the Original Creek Agreement approved by Act of Congress of March 1, 1901 (31 Stat. L. 861), and prescribed the restrictions against alienation. Said section 16 of the Supplemental Creek Agreement prohibited the alienation of the allotment by the allottee or his heirs at any time before "the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior." The Supplemental Creek Agreement became operative on August 8, 1902, by virtue of the President's proclamation, and therefore the restrictions against alienation imposed by that agreement expired August 8, 1907.

—*Baker* v. *Hammett*, 23 Okla. 480;
West. Invest. Co. v. *Tiger*, 221 U. S. 316.

Congress, by act approved April 26, 1906 (34 Stat. L. 137), section 19 thereof, *extended* the restrictions against alienation by full blood allottees for a period of twenty-five years, and by section 22 *removed* the restrictions against alienation by mixed blood *Indian* adult heirs, but extended the restrictions against alienation by full blood heirs, except upon approval by the Secretary of the Interior.

—*West. Invest. Co.* v. *Tiger*, 221 U. S. 286.

The surplus 120-acre allotment of all mixed blood Creek Indians—that is, Creek allottees of less than full Indian blood—are now and have been free from all restrictions against alienation since August 8, 1907.

—*U. S.* v. *Bartlett*, 235 U. S. 72.

All Indian lands, including surplus and homestead, inherited by heirs who are adults and of less than full Indian blood, have been alienable and free from all restraint under section 22 of the Act of Congress of April 26, 1906 (34 Stat. L. 137), since the approval of that act. *Shulthis* v. *McDougal*, 170 Fed. 529. All lands allotted to the heirs of Creek citizens who died before the selection of the allotment have been at all times since the allotment was made and are now free from all restrictions against alienation.

—*Skelton* v. *Dill*, 235 U. S. 206;
Adkins v. *Arnold*, 235 U. S. 417.

And the same is true with respect to lands in the Choctaw and Chickasaw Nations allotted to heirs in cases where the allottee—the unit of allotment—died before receiving his allotment.

—*Mullen* v. *U. S.*, 224 U. S. 448.

And, likewise, all lands allotted in the Cherokee Nation to heirs where the ancestor died before receiv-

ing same, are now and have at all times since their allotment been free from restrictions against alienation.

—*Sunday* v. *Mallory*, 237 Fed. 536 (8 C. A. A.).

As said by this Court in *Woodward* v. *deGraffenreid*, 238 U. S. 310, "There were over 3,000,000 acres of land in the domain of the Creek Nation, and approximately 16,000 Creek Indians and freedmen." As pointed out by this Court in *Woodward* v. *deGraffenreid, supra*, 238 U. S. 308, "Up to and including June 30, 1900, there have been 10,000 selections filed in the Creek Nation, amounting approximately to two-thirds of the total number of citizens, and covering the most thickly settled and improved lands of the nation." In that case this court held that allotments set apart under the Curtis Bill were merely tentative and temporary and that title was vested in the heirs (see 238 U. S. 316) under section 28 of the Original Creek Agreement, which placed all such allotments where the allottee died prior to May 25, 1901, in the same class as lands allotted after May 25, 1901, to heirs, and all such lands where the allottee selected his allotment under the Curtis Bill but died before May 25, 1901, and all such lands allotted to heirs of dead Creek citizens after May 25, 1901, passed to said heirs free from all restraint against alienation irrespective of the blood of the heir.

This was the holding of the Eighth Circuit Court of Appeals in *Welty* v. *Reed,* 231 Fed. 930, following the opinions of this Court in *Skelton* v. *Dill* and *Woodward* v. *deGraffenried.* Thus it must be obvious that there were many thousands of acres of lands in the Creek Nation allotted to or inherited by heirs and consequently free from restrictions against alienation at the time Oklahoma was admitted as a state.

Further—Congress, by the Indian Appropriation Act approved April 21, 1904 (33 Stat. L. 189), removed "all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized tribes of Indians who are not of Indian blood, except minors * * * and except homesteads."

—*Goat* v. *U. S.* 224 U. S. 459.

The Creek freedmen participated in the allotment of the Creek lands upon an equality with all the Creek Indians and received 160 acres each. The Final Rolls of citizens and Freedmen of the Creek Nation published by the Secretary of the Interior under the act approved June 20, 1906 (34 Stat. L. 325), show 5697 freedmen, exclusive of freedmen subsequently enrolled under the Act of Congress of March 3, 1905 (33 Stat. L. 1048) and the Act of Congress approved April 26, 1906 (34 Stat. L. 137). Fully one-third of the Creek lands were allotted to freed-

men. The 5697 Creek freedmen (excluding those enrolled under the two acts above mentioned) received 911,520 acres. Excluding the 40-acre homestead upon which restrictions were not removed by act of April 21st, 1904, we have 683,640 acres of freedmen surplus lands from which restrictions were removed, except in those cases where the allottee was a minor. Assuming that one-half of the freedmen allottees were minors, yet we would have over 340,000 acres of Creek land freed from all restraint against alienation by the Act of April 21, 1904. The twenty-one year restriction against the alienation of the homestead forty imposed by section 16 of the Supplemental Creek Agreement (see Appendix, p. 3) terminated upon the death of the allottee and the heirs inherited the homestead forty acres free from all restrictions against alienation. The Eighth Circuit Court of Appeals and the State Supreme Court and the Federal District Court of Oklahoma have so construed this statute. See:

U. S. v. *Cook*, 225 Fed. 756.
Rentie v. *McCoy*, 35 Okla. 77.
Parks v. *Love*, 151 Pac. 885 (Okla.).

The Act of April 21, 1904 (33 Stat. L. 189) removing restrictions against alienation by those not of Indian blood except as to minors and except as to homesteads, has been uniformly construed by the Ok-

lahoma Supreme Court and the Eighth Circuit Court of Appeals as empowering the *adult heirs of the minor allottee* and the *adult heirs inheriting the homestead,* to alienate the allotment although the allottee while a minor was disqualified to convey. In other words, upon the freedman allottee becoming of age, his power to alienate vested, or upon the *death* of the minor allottee his heirs were vested with power to alienate under the said act of April 21, 1904. That is to say, after the act of April 21, 1904, the restrictions were purely personal to the minor allottee and not against his heirs, and upon the death of the freedman allottee the homestead and surplus became alienable.

Thus, in *United States* v. *Jacobs,* 195 Fed.707,the Eighth Circuit Court of Appeals said:

> "The act of April 21, 1904, above quoted, says: 'And all restrictions upon the alienation of lands of all allottees, except minors, are removed.' This was not a removal of the restriction upon alienation by the allottee only, but was general and applied to allottees or heirs of allottees, except in cases only of minors, and no claim is made that any of the heirs of Pearlie Jacobs were minors. Hence it is clear that there was no restriction upon the alienation by them."

See also:

Roberts v. *Casner,* 152 Pac. 121 (Okla.);
Bradley v. *Goddard,* 145 Pac. 409 (Okla.).

Considering the number of mixed blood Creeks, the number of allotments made to or inherited by heirs, the number of allotments made to freedmen, we believe that approximately one-half of the lands in the Creek Nation were free from restraint against alienation at the time Oklahoma was admitted into the Union.

Peggie Ann Jefferson, the allottee, was an infant at the date of her death on June 4, 1908, but she died seized and possessed of the legal and equitable title to said land, which immediately upon her death, vested in fee simple in her heirs. Under the second paragraph of section 16 of the Supplemental Creek Agreement approved by Act of Congress of June 30, 1902 (32 Stat. L. 500) (See Appendix p. 3) her death removed all restrictions against the alienation of the forty acres segregated as her homestead. Upon her death her heirs had full power to alienate the homestead forty acres.

—*United States* v. *Cook*, 225 Fed. 756.
Rentie v. *McCoy*, 35 Okla. 77.

Although she was a minor at the time she died, her death operated to extinguish all restrictions against the alienation of the surplus 120 acres, and her heirs inherited the same in fee with full power to alienate.

—*Roberts* v. *Casner*, 152 Pac. 121 (Okla.).

United States v. *Jacobs*, 195 Fed. 707.
Bradley v. *Goddard*, 145 Pac. 409 (Okla.)
Smith v. *Bell*, 44 Okla. 370.
Charles v. *Thornburg*, 44 Okla. 380.

Irrespective of all the above, her death operated to remove all restrictions—it being expressly so provided by section 9 of Act of May 27, 1908 (35 St. L. 312), and so ruled by Eighth Circuit Court of Appeals in Richard v. Parker, not yet reported.

The declaration contained in section 1 of the Oklahoma Enabling Act (See Appendix p. 4) "That nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such *Indians*, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed," is evidence of two things: *First*, that Congress understood and intended that the State should have full, complete and exclusive sovereignty over the persons and allotted lands of all tribal citizens other than restricted *Indians*; and *Second*, that the State conceded with-

out question that Congress possessed the same jurisdiction over Indians and their tribal property in Oklahoma that it possessed in other states—no more nor no less. The following portion of section 2 of the Enabling Act is conclusive evidence that Congress understood and intended that all tribal citizens should be subject to the laws of the State with respect to all matters over which Congress could exercise no authority—in other words, that Oklahoma was admitted as a state upon an equal footing with all the other states in the Union; that part of section 2 is as follows:

> "That all male persons over the age of twenty-one years, who are citizens of the United States, or *who are members of any Indian Nation or tribe in said Indian Territory and Oklahoma*, and who have resided within the limits of said proposed State for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed State; and *all persons qualified to vote for said delegates shall be eligible to serve as delegates.*" (Italics ours.)

This meant statehood for the Indians, freedmen and all other tribal citizens. A sovereign state cannot exist upon an equality with the original thirteen states unless it have the same jurisdiction over the territory, lands and property within its boundaries,

and the inhabitants and citizens residing therein, irrespective of race. Not only were the Indians and freedmen residing within the limits of the Indian Territory authorized to vote for and choose delegates to form a constitutional convention, but all such Indians and freedmen irrespective of their degree of blood were made eligible to serve as delegates to the constitutional convention. Many Indians were elected as delegates to the constitutional convention, and one duly enrolled citizen of Indian blood of the Cherokee Nation became a United States Senator from Oklahoma, and a Choctaw became a member of the House of Representatives.

We have not found this provision in the Enabling Act authorizing the organization of any of the other new States. This provision was not in that part of the act of June 16, 1906 (the Oklahoma Enabling Act), providing also for the organization and admission of New Mexico and Arizona as one State, though there were a great many Indians in those two Territories. No such provision will be found in the Arizona and New Mexico Enabling Act passed in June, 1910. While we have not examined the Enabling Acts of all the new states in the west, we have examined a good many of them and there is no such provision in any of those we have examined. We have examined the acts authorizing the admission of North Dakota,

South Dakota, Montana, and Washington (25 Stat. L. 676), Colorado (18 Stat. L. 474), Utah (28 St. L. 107), and Kansas. The act approved February 27, 1889, providing for the organization of the States of North and South Dakota, Montana, and Washington provided that only those persons were eligible to vote for delegates to the constitutional conventions who were qualified voters for representatives in the Territory legislatures. Only those persons competent under territorial laws for representatives in the territorial legislature were made competent and qualified for delegates to the constitutional convention. The act organizing the Dakota Territory (12 St. L., 239) provided that every white male inhabitant over twenty-one years of age should be a competent voter if a citizen of the United States and thereafter the qualification of the voters could be fixed by the territorial legislature with this proviso:

> "That the right of suffrage and of holding office shall be exercised only by citizens of the United States and those who shall have declared on oath their intention to become such and shall have taken an oath to support the Constitution of the United States."

Congress likewise fixed the qualification of voters in the act or organizing the Territory of Washington (10 St. L., 172). Thus it will be seen that Indians, not then being citizens of the United States,

were not qualified voters in either the Territories mentioned or for delegates to the constitutional convention or for State officers, etc. The act providing for the organization of North and South Dakota, Montana, and Washington as separate States contained the following provisions not found in the Oklahoma Enabling Act, to-wit:

> "The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to *Indians not taxed,* and not be repugnant to the Constitution of the United States and Delcaration of Independence," etc.

Further, the people inhabiting said proposed States, etc., "disclaim all *right and title* to the unappropriated p u b l i c lands," etc; "and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same (which clearly means public lands and also lands of Indians and Indian tribes) shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. * * * But n o t h i n g herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any

lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe."

A similar provision is in the Colorado Enabling Act (18 St. L. 474); also Utah (28 St. L. 107).

With respect to Kansas, we cite General Statutes of Kansas of 1868. In the Organic Act organizing the Territory of Kansas (St. 1868, 25) it is expressly provided "that nothing in this act contained shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the U. S. and such Indians, or to *include* any Territory which by treaty with any Indian tribe or not, without the consent of said tribe, to be included in the territorial limits or jurisdiction of any State or Territory; but all such territory shall be *excepted out of the boundaries*, and constitute *no part of the Territory of Kansas* until said tribe shall signify their assent to the

President of the United States, to be included within the said Territory of Kansas, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law or otherwise, which it would have been competent to the Government to make, if this act had never been passed."

Only "white male inhabitants above the age of 21 years were qualified voters," and although the legislature of the Territory was given power to thereafter fix the qualifications of voters and those to hold office, yet the legislature was denied the power to make any one other than a citizen of the United States a qualified voter or competent to hold office, and Indians, not then being citizens of the United States, were therefore not voters or qualified to hold office.

In the act of Congress approved January 29, 1861 (Kan. St. 1868, p. 66), admitting Kansas as a State, section 7 thereof, we find the same language above quoted from the Organic Act.

The act admitting Kansas expressly excluded the Indians and their lands from the jurisdiction of the State, and so far as the State government of Kansas was concerned the Indians and their lands, although inside the State boundary lines, were nevertheless, a foreign people and foreign territory.

The Five Civilized tribes have always been treated more liberally by the Federal Government than any other tribes. Their lands were allotted in fee, and the Government did not reserve any proprietary interest. *The members of the Five Civilized tribes were just as much permitted to organize a State as any of the other inhabitants of the Indian Territory and Oklahoma Territory.* So far as their civil and political rights are concerned, they were recognized as possessing all the qualifications necessary to organize a State. In no other organic act or enabling act has the Indian been so treated and considered.

The point we are trying to impress upon the court is that the Federal Government never made any distinction in the inhabitants and people of the Indian Terriory and Oklahoma Territory. The *people* of those two Territories, irrespective of race, were authorized to organize a State, and we assert that Congress never for one moment considered, when it passed the Enabling Act, that the United States had any further guardianship over the members of the Five tribes except in so far as necessary to wind up the tribal affairs. Their tribal laws had long before been abolished. Their courts were abolished long prior to statehood. Their chiefs or governors had no authority further than to sign patents and preside over council meetings. The Creek council had no

jurisdiction to pass any law at the time Oklahoma was admitted as a State except to appropriate money, and such act of the council would have no validity until approved by the President of the United States.

All tribal courts were abolished long before statehood, and Congress took charge of all the tribal affairs and legislated directly. In other words, the Indian Territory had no territorial government in the sense that Oklahoma Territory and Washington Territory, etc., had prior to statehood. So we say when statehood came it was statehood for the Indians, and it takes a great deal of laborious stretching to get any guardianship whatever over them further than the administration of their tribal affairs, and restricted lands.

In *United States* v. *Waller*, 243 U. S. 452, this Court had under consideration the power of the United States to maintain a suit to cancel a deed executed by an Indian free from restrictions against alienation. The Government instituted the action to set aside the deed on the ground that it had been obtained by fraud. This Court reviewed the legislation pertaining to the Indians of the White Earth Reservation and among other things said (243 U. S. 462) that "This distinction between the qualifications of adult mixed and full-blood Indians is one which Congress not infrequently applied."

This court further held in that case that when Congress removed all restrictions against alienation that "in whatever other respect the Government of the United States may continue to hold these Indians as wards, needing and receiving protection from its authority over their persons and property, as to the lands in question the United States, in the passage of the Clapp Amendment, evidenced its purpose to grant full power and control to the class named. *As to them the Government has no further interest in or control over the lands.*" (243 U. S. 463.) In that case this Court also approved its holding in *Dickson* v. *Land Company*, 242 U. S. 371, holding that the removal of restrictions against alienation extinguished the jurisdiction of the Federal Government over such unrestricted lands, and approvingly quoted the following from its opinon in *Dickson* v. *Land Company*, 242 U. S. 375, to-wit:

> "With those restrictions entirely removed and the fee simple patent issued it would seem that the situation was one in which all questions pertaining to the *disposal* of the lands *naturally would fall within the scope and operation of the laws of the State.* And that Congress so intended is shown by the Act of May 8, 1906, c. 2348, 34 Stat. 182, which provides that when an Indian allottee is given a patent in fee for his allotment he 'shall have the benefit of and be subject to the laws, both civil and criminal, of the

State.' *Among the laws to which the allottee became subject, and to the benefit of which he became entitled, under this enactment were those governing the transfer of real property, fixing the age of majority and declaring the disability of minors.*" (Italics ours.)

Using the language of this Court in *United States* v. *Waller*, 243 U. S. 463, "in whatever other respect the Government of the United States may continue to hold these Indians as wards, needing and receiving protection from its authority over their persons and property, as to the lands in question (all lands free from restrictions) the United States, * * * (in admitting Oklahoma) evidenced its purpose to grant full power and control to the class named (unrestricted allottees and their heirs), and as to them the Government has no *further interest in or control over the lands.*" And upon the admission of Oklahoma as a State all laws in force in the Creek Nation and the Indian Territory pertaining to the *transfer* of the land by descent and distribution were extinguished, and as said by this Court in *Dickson* v. *Land Company*, 242 U. S. 375, "the situation was one in which all questions pertaining to the *disposal* of the lands *naturally* would fall within the scope and operation of the laws of the State." When the lands of the Five tribes were first allotted none of them were alienable, but their prior status of inalienabil-

ity is no reason for holding that such lands did not become subject to the exclusive sovereignty of the State of Oklahoma upon its admission—the same as lands of white persons, town lots and other unrestricted property. Statehood in and of itself means a change of sovereignty.

Thus in *McNulty* v. *Batty,* 10 How. 78, 13 L. ed. 335, this Court said that:

> "By the admission of the State of Wisconsin into the Union, on the 29th of May, 1848, the territorial government ceased to exist, and all the authority under it, including the laws organizing its courts of justice, and providing for a revision of their judgments in this court by appeals or writs of error. This appellate power does not depend upon the Judiciary Act of 1789; but upon laws regulating the judicial proceedings of the territory. *And these necessarily ceased with the termination of the territorial government.*"

In *Benner* v. *Porter,* 9 How. 242-243, 13 L. ed. 122, this Court, in discussing the admission of the State of Florida said:

> "After the unconditional admission of the territory into the Union as a State, on the 3rd of March, 1845, with her constitution, and complete organization of the government under it, by which the authority of the State was established throughout her limits, it is difficult to see upon what ground it can be maintained that any

portion of the territorial government or jurisdiction remained still in force. (Italics ours).

"The distinction between the Federal and State jurisdictions, under the Constitution of the United States, has no foundation in these territorial governments; and consequently no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the Federal and State authorities. *There is but one system of government, or of laws operating within their limits,* as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction. (Italics ours.)

"They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the Legislative Department, and subject to its supervision and control. Whether, or not, there are provisions in that instrument which extend to and act upon these territorial governments, it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between Federal and State jurisdiction.

"*We think it clear, therefore, that on the unconditional admission of Florida into the Union as a State on the 3rd of March, 1845, the*

territorial government was displaced, abrogated, every part of it; and that no power of jurisdiction existed within her limits, except that derived from the State authority, and that by force and operation of the Federal Constitution and laws of Congress; and, especially, no jurisdiction in federal cases until Congress interfered and extended the judicial tribunals of the Union over it.''

If lands of tribal citizens unrestricted at the time Oklahoma was admitted into the Union are not as much under the jurisdiction and sovereignty of the State of Oklahoma as property of other citizens, then Oklahoma is not a state—has not been admitted upon an equality with the other states.

In *Kansas* v. *Colorado*, 206 U. S. 95, this court said:

> "But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full power of local sovereignty which belongs to other states."

See:

Coyle v. *Oklahoma*, 221 U. S. 559;
United States v. *Sandoval*, 231 U. S. 38.

Congress had no authority by the Enabling Act or otherwise to put any laws in force in the State of Oklahoma other than such laws as it had the power under the Federal Constitution to enact, and there

is no provision of the Federal Constitution authorizing Congress to prescribe a law of descent and distribution for any state, nor to legislate upon any local matter pertaining to the police, municipal and domestic or local laws of a state. It has been repeatedly announced by this court that the Federal Government is one of enumerated powers; that it has no inherent power or sovereignty; that the enumeration of the powers granted is to be found in the Constitution of the United States, and in that alone; that the manifest purpose of the tenth amendment to the constitution is to put beyond dispute the proposition that all powers not granted are reserved to the people, and that if in the changes of the years further powers ought to be possessed by Congress they must be obtained by a new grant from the people.

—*United States* v. *Harris*, 106 U. S. 629-644; *Grafton* v. *United States*, 206 U. S. 333, 51 L. ed. 1084.

In *United States* v. *Fox*, 94 U. S. 315, the court said:

> "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established

principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick* v. *Sullivant*, 10 Wheat. 202. The power of the state in this respect follows from her sovereignty, within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. *The title and modes of disposition of real property within the state, whether inter vivos or testamentary, are not matters placed under the control of federal authority.*" (Italics ours.)

—*New York* v. *Miln*, 11 Pet. 102, 9 L. ed. 648;

Gibbons v. *Ogden*, 9 Wheat. 1;

Kidd v. *Pearson*, 128 U. S. 1;

4 Enc. of U. S. Supreme Court Reports, p. 158;

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed. 565;

Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77;

Mager v. *Grima*, 49 U. S. 8 How. 493, 12 L. ed 1170;

Wilcox v. *Jackson*, 13 Pet. 498, 10 L. ed. 264;

McCormick v. *Sullivant*, 10 Wheat. 192, 6 L. ed. 300;

Schley v. *Car Co.*, 120 U. S. 580, 30 L. ed. 789;

U. S. v. *Perkins*, 163 U. S. 625, 41 L. ed. 287;

Goodman v. *Winter*, 64 Ala. 428;
U. S. v. *Fox*, 94 U. S. 315, 24 L. ed. 192;
Magoun v. *Ill. Trust Co.*, 170 U. S. 282, 42 L. ed. 1041;
Snyder v. *Bettman*, 190 U. S. 249, 47 L. ed. 1035;
Nat. Safe Dep. Co. v. *Illinois*, 232 U. S. 58;
Langdon v. *Sherwood*, 124 U. S. 74, 31 L. ed. 344;
O'Callaghan v. *O'Brien*, 199 U. S. 99, 50 L. ed. 101;
Ellis v. *Davis*, 109 U. S. 485, 27 L. ed. 1006;
Knowlton v. *Moore*, 178 U. S. 43, 44 L. ed. 970;
Plumber v. *Coler*, 178 U. S. 115, 44 L. ed. 998.

The provisions of sections 13 and 21 of the Oklahoma Enabling Act obviously amount to nothing further than a consent upon the part of Congress that the state, through its constitution, may adopt the territorial laws of Oklahoma. It will not be contended that Congress has any power to put in force in the State of Texas the general laws of Kansas or prescribe any local or municipal laws in the State of Texas, or that Congress has authority to prescribe by law the method or manner of the transfer of property in Texas either by deed, will, inheritance or otherwise, and unless Congress has that authority in Texas it has no such authority in Oklahoma, except

possibly as to restricted Indian lands, because, as held by this court, Congress, neither by general law nor by compact with the state through the Enabling Act or otherwise, *can legislate upon any subject in one particular state it cannot legislate upon generally throughout all the states.* If the constitutional convention had seen proper it could have adopted the laws of Kansas or any other state, and there would have been no remedy upon the part of the Federal Government except to reject statehood for the two territories. The Oklahoma laws of descent and distribution obtained their efficacy from section 2 of the Schedule of the Oklahoma Constitution, which is as follows:

> "All laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law."

By virtue of the above provision of the Schedule to the Oklahoma Constitution the Oklahoma territorial laws of descent were *unqualifiedly, unconditionally* and *unmodifiedly* put in force in Oklahoma. The territorial laws of descent were not put in force in the State of Oklahoma by virtue of the Enabling

Act but by virtue of the constitution of the state, and, further, there is no provision in the state constitution or territorial laws of descent depriving non-citizens of the Creek Nation from inheriting unrestricted allotted lands, or any other allotted lands. Running the risk of repetition we assert positively:

First. That the territorial laws of descent were not put in force in the State of Oklahoma by the Enabling Act.

Second. That such laws were put in force in the State of Oklahoma by the Oklahoma Constitution, and came into effect by virtue of statehood itself.

Third. That there is no qualification or limitation placed upon the Oklahoma territorial laws of descent by the state constitution.

Neither does section 1 of the Enabling Act refute or modify this proposition. Section 1 of the Enabling Act is as follows:

> "*Provided,* That nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the *Indians* of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such *Indians,* their lands,

property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

We submit:

First. That the disposition of real or personal property within a state either by will, descent, deed or any other transfer, is controlled exclusively by the laws of the state, except where such property is still within the jurisdiction of the United States, either on account of being public lands of the Federal Government, Federal post-offices, military reservations or Indian reservations or tribal lands, or perhaps restricted tribal allotments still under the administration and guardianship of the Federal Government.

Second. That unless the Federal Government, under its constitutional prerogatives, and independent of any compact or agreement with the state, had jurisdiction over the property in question, Congress had no authority to govern its disposition by will, descent, deed or otherwise, and can make no law on that subject, and this being true, then it follows that the Oklahoma territorial laws—all of them—those of descent, as well as others, became operative not by the Enabling Act but by the schedule of the state constitution; that is by virtue of statehood itself.

Section 1 of the Enabling Act purporting to reserve to the United States power to make any law after statehood as well as before pertaining to Indians, their lands, property or other rights, did not operate to confer any jurisdiction upon Congress, it being well settled by this court that such reservation amounts to nothing further than a recognition by the state of the power of Congress to exercise jurisdiction over certain subjects within a state irrespective of such reservation or stipulation. This is settled by *Coyle* v. *Oklahoma*, 221 U. S. 568, wherein Mr. Justice LURTON said:

> "The reference by Justice CATRON to the terms and conditions in Act of 1812, as to a provision in the Act of February 20, 1811 (2 Stat. 641, 642), quite common in enabling acts, by which the new state disclaimed title to the public lands, and stipulated that such lands should remain subject to the sole disposition of the United States, and for their exemption from taxation, and that its navigable waters should forever remain open and free, etc. Such stipulations, as we shall see, *being within the sphere of congressional power*, can derive no force from the consent of the state. Like stipulations, as well as others in respect to the control by the United States of large Indian reservations and Indian population of the new state, are found in the Oklahoma Enabling Act. Whatever force such provisions have after the admission of the state

may be attributed to the power of Congress over the subjects, derived from other provisions of the constitution, rather than from any consent by or compact with the state.

"So far as this court has found occasion to advert to the effect of enabling acts as affirmative legislation affecting the power of new states after admission, there is to be found no sanction for the contention that any state may be deprived of any of the power constitutionally possessed by other states, as states, by reason of the terms in which the acts admitting them to the Union have been framed."

Then summing up the whole subject-matter Mr. Justice LURTON said (p. 573):

"*The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.*" (Italics ours.)

—*Ex parte Webb*, 225 U. S. 663;

United States v. *Wright*, 229 U. S. 226;

United States v. *Sandoval*, 231 U. S. 38.

THE TEST.

From all of which it appears that the test by which to determine what federal laws operative in a territory prior to statehood remain in force after statehood is found in the question, What laws have the Federal Government authority to enact after statehood irrespective of any attempted reservations in the Enabling Act regulating the conduct of citizens of a state and the disposition of their property situated within a state? The people not having delegated to the Federal Government authority to prescribe a law of descent controlling the devolution of property within a state, it is evident that all federal laws upon that subject operating in a territory prior to statehood were terminated by statehood in and of itself.

Two.

It has long been the established public policy of the United States to leave the devolution of Indian Tribal lands allotted in severalty, to the local laws of the state or territory in which the allotment is situated.

In *Hallowell* v. *United States,* 221 U. S. 317, this court had under consideration the Act of 1897 prohibiting the introduction of intoxicating liquors into Indian country and into an Indan allotment set apart

to the Omaha Indians in the State of Nebraska, and while sustaining the power of the Federal Government to make and enforce such law this court nevertheless expressly recognized that although such Indians were still wards of the Federal Government, nevertheless they were in many respects subject to the laws of the State of Nebraska, and among other things said (221 U. S. 324) that "while for many purposes the jurisdiction of the State of Nebraska had attached, and the Indian as a citizen was entitled to the rights, privileges and immunities of citizenship, still the United States within *its own territory* and in the interest of the Indians, had jurisdiction to pass laws protecting such Indians from the evil results of intoxicating liquors as was done in the Act of January 30, 1897," etc.

That Indians to whom lands in severalty have been allotted, though still wards of the Federal Government, are subject to a great many laws of the state in which the lands are situated, was further recognized by this court in *Kennedy* v. *Becker,* 241 U. S. 556.

The law of descent is local and domestic legislation. Congress, by the Act of May 2, 1890 (26 Stat. L. 81), extended over and put in force a great many of the Statutes of Arkansas governing the domestic and local affairs in the Indian Territory, and all of

said laws under the provisions of the Indian Appropriation Act approved June 7, 1897 (30 Stat. L. 83), were made to apply "to all persons therein, irrespective of race."

For instance the Arkansas law on assignments, attorneys, bills of exchange and promissory notes, civil rights, common and statute law of England, contempts, municipal corporations, *descents and distributions*, divorce, dower, evidence, execution, fees, forcible entry and detainer, statute of frauds, gaming contracts, guardians, curators and wards, *habeas corpus*, injunction, insane persons and drunkards, judgments, decrees, landlord and tenant, and numerous other matters, such as marriage contracts and the rights of married women, mortgages, notaries public, pleading and practice, and other similar laws. These laws made up a mass of local and domestic laws governing the people of the Indian Territory irrespective of race, and are general in their nature.

Neither the Cherokee Agreement approved by Act of Congress of July 1, 1902 (32 Stat. L. 716), nor the Choctaw-Chickasaw Agreement approved by Act of Congress of July 1, 1902 (32 Stat. L. 641), nor the Seminole Agreement approved by Act of Congress of July 1, 1898 (30 Stat. 567), nor the Supplemental Seminole Agreement approved by Act of Congress approved June 2, 1900 (31 Stat. L. 250), contained

any reference to the Arkansas law of descent, except with respect to allotments made to heirs, and since the admission of Oklahoma as a state it has been conceded that the Oklahoma laws of descent superseded the Arkansas laws of descent controlling the devolution of allotments in those tribes prior to statehood, and the whole argument in this case is based on the theory that because section 6 of the Supplemental Creek Agreement re-enacted the Arkansas law of descent, that law acquired a *permanency, perpetuity, immortality and eternity as immutable and as unchangeable as the laws of the Medes and Persians.* The question was not raised seriously in the Creek Nation until the year 1912 or 1913, and in *Templeton* v. *Bruner,* 42 Okla. 6, the State Supreme Court proceeded upon the assumption that the Oklahoma law of descent controlled the devolution of a Creek allotment. Likewise, the same was true in *Labadie* v. *Smith,* 41 Okla. 773. The Federal court for the Eastern District of Oklahoma in *Bartlett* v. *Okla Oil Company,* 218 Fed. 380, held the Oklahoma law of descent was in force in the Creek Nation after statehood.

In *Crouthamel* v. *Welch,* 156 Pac. 302 (not yet officially reported) the Oklahoma Supreme Court on March 14, 1916, had before it the construction of section 8418 of the Revised Laws of Oklahoma of

1910, a part of the Oklahoma law of descent, as applied to the devolution of the allotment of a Choctaw by blood who died October 6, 1910, nearly three years after statehood. The court and counsel proceeded upon the assumption that the Oklahoma law of descent controlled the devolution, and the only question involved was the construction of the statute.

In *Aldridge* v. *Whitten*, 156 Pac. 667 (not yet officially reported), decided March 28, 1916, the court proceeded without question to apply the Oklahoma law of descent to the allotment of a half-breed Seminole Indian who died in October, 1908.

Also in *Van Buskirk* v. *Grisso*, 157 Pac. 307, the court again applied the Oklahoma law of descent to the devolution of a Seminole freedman allotment.

In *Palmer* v. *Cully*, 153 Pac. 154, decided November 16, 1915, the Oklahoma Supreme Court held that upon the admission of Oklahoma as a state full-blood Seminole Indians became subject to the general state laws relative to marriage and divorce.

In *Lowry* v. *Weaver*, 15 Fed. Cas. No. 8584, p. 1058, the court held that the state laws controlled the method of conveying restricted lands subject to the approval of the President. The approval of the President was required, but all things else were governed by the state laws.

This court in *Lomax* v. *Pickering*, 173 U. S. 27, 43 L. ed. 601, held that the deed of a restricted Indian though requiring the approval of the President to impart validity, was, nevertheless, eligible to record under the laws of the state where the land was situated, and that the record of such deed without the approval of the President constituted notice to a subsequent purchaser under the Illinois Conveyance Act.

The General Allotment Act approved February 8, 1887 (24 Stat. L. 388), is entitled "An Act to provide for the allotment of lands, in severalty, to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes"; section 5 of the above said act provides: "that the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall so far as practical, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act." We call especial attention to chapter 28 of Bledsoe's Indian Land Laws, second edition, beginning on page 284 and extending to page 293.

wherein the author shows that the laws of descent of the state or territory in which the various tribes are situated have been adopted by Congress and control the devolution of their allotments.

Congress has never undertaken to outline a statute of descent. It has universally adopted the statute of the state or territory.

Now, it would seem to be extremely unlikely that Congress would intend to keep in force in a mere fraction of the State of Oklahoma the Arkansas law of descent and put in force the Oklahoma law of descent as to all other tribes. The Oklahoma law of descent applies to the Osage, Comanche, Kiowa, Apache, Kaw, Kickapoo, Shawnee, and other tribes in the state, as well as the Choctaw, Chickasaw, Cherokee and Seminole, and it would certainly be strange if Congress reserved the Arkansas law of descent in the Creek Nation and put in force the Oklahoma law as to all other tribes in the state. There is certainly no superiority about the Arkansas statute of descent requiring any inference to be indulged in its favor. Certainly we are not to *infer* that Congress intended to continue in force the Arkansas law of descent, it clearly being a misfit, as shown by the decision of this court in *McDougal* v. *McKay*, 237 U. S. 372, and the Court of Appeals in *Shulthis* v. *McDougal*, 170 Fed. 529.

In *McCauley* v. *Tyndall*, 94 N. W. 813, and *Porter* v. *Parker*, 94 N. W. 123, the Nebraska Supreme Court held that the state laws controlled the devolution of restricted Indian allotments in that state as provided for under the general allotment act of '87.

In *Brown* v. *Belmarde*, 3 Kan. 35-41, the court considered a case where a life estate had been allotted to a member of the Kansas Indians under the Treaty of June 3, 1825. The allottee died in 1847, and of course his interest terminated. In 1860 Congress passed an act granting the title in fee to the reservees then living, and further provided that "in case any of said reservees named in the said sixth article are deceased and leaving heirs, then all the title, interest or estate of the United States to the land allotted to such deceased reservees, is hereby vested and confirmed in such persons as shall, by the Secretary of the Interior, be decided to be heirs of such deceased reservees." In July, 1862, Congress passed a joint resolution repealing that part of the Act of 1860 conferring authority upon the Secretary of the Interior to determine who were the heirs of a deceased reservee. The Kansas court held that the law of descent in force at the time the act was passed in 1862 determined who were the heirs, and among other things said (p. 42) that: "Had Lavonture been living at the time of the passage of the act, the

title would have vested in him; and if he had died the next day, there can be no question that his heirs would have been determind by the law of the state at the time of his death."

In *McCullagh* v. *Allen*, 10 Kan. 150, the court had under consideration what law of descent controlled the devolution of an Ottawa allotment. Article 9 of the Treaty of 1831 between the United States and the Ottawa tribe guaranteed that the lands reserved to the Ottawa tribe should never be within the bounds of any state or territory. In 1862 that guarantee was abrogated, and by that treaty it was stipulated that at the expiration of five years the members of the tribe should become citizens of the United States and their tribal relations cease. Provision was made for the allotment of the Ottawa lands. The court held that the laws of Kansas formed the law of descent at the death of an allottee in 1863.

In *Edde* v. *Pash-Pah-O*, 48 Pac. 884, the court had under consideration the descent applicable to the Kickapoo Indians in Kansas. The court said:

> "The second section of the Act of Congress of 1886 (chapter 897), under which plaintiff in error claims, reads as follows: 'That where allottees under the aforesaid treaty shall have died, or shall hereafter decease, leaving heirs surviving them, and without having obtained

patents for lands allotted to them in accordance with the provisions of said treaty, the Secretary of Interior shall cause patents in fee simple to issue for the lands so allotted in the names of the original allottees, and such allottees shall be regarded, for the purpose of a careful and just settlement of their estates, as citizens of the United States and of the State of Kansas; and it shall be competent for the proper courts to take charge of the settlement of their estates, under all the forms and in accordance with the laws of the State of Kansas, as in the case of other citizens deceased; and where there are children of allottees left orphans, guardians for such orphans may be appointed by the probate court of the county in which such orphans may reside; and such guardians shall give bonds, to be approved by the said court, for the proper care of the person and property of such orphans as provided by law.' Under this section, so far as the settlement of her estate and the distribution of her property, real and personal, is concerned, the deceased allottee is to be considered as a citizen of the United States and of the State of Kansas, and distribution made accordingly."

The descent of the lands allotted to Umatilla Indians within the Umatilla Indian Reservation in Oregon is governed by the state laws of Oregon.

—*Non-She-Po* v. *Wa-Win-Ta*, 37 Ore. 213, 82 Am. St. Rep. 749;

McBean v. *McBean*, 61 Pac. 418 (Ore.).

The power to tax unrestricted Creek allotments vested in the State of Oklahoma immediately upon its admission (*Bartlett* v. *U. S.*, 203 Fed. 410), though restricted lands were not taxable.

—*United States* v. *Rickert*, 188 U. S. 433;
Blue Jacket v. *Commissioners*, 5 Wall. 737;
Yellow Beaver v. *Commissioners*, 5 Wall. 757;
Fellows v. *Denniston*, 5 Wall. 761.

If the power of the state to tax unrestricted lands accrued, it is difficult to see why the state laws of descent do not unqualifiedly apply.

Section 23 of the Act of Congress of April 26, 1906 (34 Stat. L. 137), entitled, "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," granted full authority to all allottees except full bloods to dispose of their allotments by will. Section 23 is as follows:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein; *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and

approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner."

Section 8 of the Act of Congress of May 27, 1908 (35 St. L. 312), entitled "An Act for the Removal of Restrictions from part of the lands of allottees of the Five Civilized tribes, and for other purposes," amended said section 23 above quoted so as to authorize wills of full bloods to be approved by *a judge of a county court of the State of Oklahoma.* Said section 8 is as follows:

> " That section twenty-three of an Act entitled 'An Act to Provide for the final disposition of the affairs of the Five Civilized tribes in the Indian Territory, and for other purposes,' approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words 'or a judge of a county court of the State of Oklahoma'."

Prior to statehood the law in force in the Indian Territory pertaining to wills, their manner of execution, attestation, etc., applied under section 23 of the Act of April 26, 1906, without any modification to the wills of all allottees other than full bloods, and it must necessarily follow that after statehood the Oklahoma laws pertaining to wills, their execution, attestation, etc., applied to the same cases, and also

applies with respect to wills of full bloods, except as modified by section 23 of the Act of April 26, 1906, and section 8 of the Act of May 27, 1908, above quoted. That is bound to be true or there is no way of telling what law does control any of these matters. Both the former laws and the laws of the State cannot operate, and it has been and certainly is the policy of Congress to leave these matters to the local state law. If Congress intended to retain in force after statehood any of the laws in force prior to statehood, it should have done so by clear and unambiguous provisions of the statute.

In *Buchser* v. *Buchser,* 231 U. S. 161, this Court said:

> *"If the United States could impress a peculiar character upon land within a State after parting with all title to it, at least the clearest expression would be necessary before such a result could be reached."* (Italics ours.)

THREE.

Senseless confusion would arise from applying one law of descent to part of the Creek lands and the Oklahoma law of descent to all the other lands in the state.

There can be no question that the Oklahoma law of descent applies to the devolution of all unre-

stricted lands. Such lands are taxable and subject alone to the laws of the State of Oklahoma, because as this court said in *United States* v. *Waller*, 243 U. S. 452, when fee simple title passed and all restrictions against alienation were removed, the United States "has no further interest in or control over the lands."

We contend that the allotment in this case passed to the heirs unrestricted, and upon the death of the allottee became *unconditionally and unqualifiedly* subject to the Oklahoma laws of descent.

This contention is confirmed by section 4 of the Act of Congress of May 27, 1908 (35 Stat. L. 312), wherein it is provided:

> ***"That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."***

A provision of similar import was contained in the Act of Congress of May 8, 1906, which this court in *Dickson* v. *Luck Land Company*, 242 U. S. 371, held operated to apply all the laws of the State governing the transfer of real property, etc.

We have shown that the land of this character —allotment of a freedman minor, passed to the heirs free from all restrictions against alienation, but if

the Court should hold that the land involved in this case was restricted, and therefore in the class with full blood allotments, neverheless, the Oklahoma law of descent unconditionally applied. At any rate, the Oklahoma law of descent has since statehood controlled the devolution of all unrestricted lands, and certainly Congress never intended to keep alive the Arkansas law in a mere fraction of the State, and in that fraction, applicable only to a few persons, to-wit: full-blood Creeks. All mixed-blood Creeks were free from restrictions since August 8, 1907—several months before statehood—as heretofore shown.

—*U. S.* v. *Bartlett*, 235 U. S. 72.

In refering to a situation of this kind this Court in *Woodward* v. *deGraffenried*, 238 U. S. 316, said:

> "The confusion that would result from applying two variant systems of law at one and the same time, with respect to lands lying side by side and otherwise indistinguishable, is of course apparent. The suggested construction must be rejected."

Sutherland Statutory Construction, Vol. II, Sec. 471, says:

> "The legislative department is supposed to have a *consistent design and policy and to intend nothing inconsistent or incongruous.* The mischief intended to be removed or suppressed or the cause or necessity of any kind which induced

the enactment of a law are important factors to be considered in its construction. 'The purpose for which the law was enacted is a matter of prime importance in arriving at a correct interpretation of its terms'."

Our theory is further confirmed by sections 1 and 9 of the Act of May 27, 1908 (35 Stat. L. 312). While section 1 of said act has no application in the Creek Nation other than to full bloods and homesteads (*U. S.* v. *Bartlett*, 235 U. S. 72), nevertheless, while that section removes restrictions on homesteads of those less than one-half blood it extended restrictions on homesteads of those of half or more Indian blood. Said section 9 provides, "That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thir-

ty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further,* That the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section." This section is a statutory construction of the former laws and no more nor less than a declaration removing any uncertainty as to the devolution of certain lands restricted and entailed for 25 years by this section. Section 9 did not undertake to put in force the Oklahoma law of descent, except with respect to the lands of citizens of one-half or more Indian blood; and in the Creek Nation only operated on homesteads of those of one-half or more Indian blood. Now it would be remarkable if the Oklahoma laws of descent control the devolution of allotments of Creek Indians of one-half or more Indian blood since May 27, 1908, and the Arkansas law was still in force as to freedmen and all citizens of the tribe of less than half Indian blood. Certainly no such nonsensical confusion was ever intended or contemplated by Congress.

That section 9, Act 1908, applied to Oklahoma law of descent is held by the Eighth Circuit Court of Appeals in *Parker* v. *Riley,* 243 Fed. 44.

FOUR.

The rules of statutory construction involved in repeals of special and local laws by general laws have no application to this situation.

Opposing counsel contend that section 6 of the Supplemental Creek Agreement was special legislation and not repealed by the Enabling Act because the Enabling Act is a general law. The State Supreme Court reached the right result, except as to the proviso barring non-citizens. With great deference to that court we doubt whether it was necessary to reason the matter out along the lines followed by that court—involving the rules applicable to general laws and special laws, repeals, etc. The Enabling Act substituted a new sovereignty for the former, and this new sovereignty had the power to enact its own code of laws, and did so by its constitution, and we doubt the soundness of treating the Enabling Act as a mere general statute to be construed with a view to ascertaining whether or not it operated to repeal by implication a special law. *Statehood in and of itself terminated the local laws in force in the Indian Territory and the Territory of Oklahoma,* but the rule announced by this court in *United States* v. *Tyner,* 78 U. S. 11 Wall. 88-92, is by analogy the proper one to apply in this situation. In that case this court said:

"When there are two acts on the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first, and even where two acts are not in express terms repugnant, *yet if the latter act covers the whole subject of the first and embraces new provisions plainly showing that it was intended as a substitute of the first act, it will operate as a repeal of that act.*" (Italics ours.)

—*District of Columbia* v. *Hutton*, 143 U. S. 18;

Great Northern Railway Co. v. *United States*, 155 Fed. 945.

"Special or local laws will be repealed by general laws when the intention to do so is manifest, as where the latter are intended to establish *uniform* rules for the whole state."

—Sutherland on Statutory Construction, Vol. 1, Sec. 276;

State ex rel. v. *Pearcy*, 44 Mo. 159;

Rogers v. *Nashville C. & St. L. Ry. Co.*, 91 Fed. 299;

36 Cyc 1089-1090;

Black on Interpretation of Laws, p. 116.

FIVE.

Neither section 6 of the Supplemental Creek Agreement nor the provisions of the Indian Appro-

priation Act of May 27, 1902 (32 Stat. L. 245), putting in force in the Creek Nation the Arkansas law of descent was in any sense special legislation but a general law, and therefore repealed by the Enabling Act.

Plaintiffs are beat on their own theory.

The 31st section of the Act of Congress approved May 2, 1890 (26 Stat. L. 81), "extended over and put in force in the Indian Territory, until Congress shall otherwise provide," certain general laws of the State of Arkansas in force at the close of the session of the general assembly for Arkansas for 1883, as published in the volume known as Mansfield's Digest of the Statutes of Arkansas "which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section," and among the Arkansas laws thus put in force is chapter 49 of Mansfield's Digest entitled "Descent and Distribution."

In the Indian Appropriation Act approved June 7, 1897 (30 Stat. L. 83), Congress further provided that "the laws of the United States and the State of Arkansas in force in the territory shall apply to all persons therein, *irrespective of race,* said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes:" Also, the Original

Curtis Bill approved June 28, 1898 (30 Stat. L. 495), section 28 thereof abolished from and after the 1st day of July, 1899, all the tribal courts and transferred all civil and criminal cases therein pending to the United States Courts, and by section 26 declared, "That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

Thus it clearly appears, as held by the Indian Territory Court of Appeals in *Nivens* v. *Nivens*, 4 Ind. Ter. Rep. 30, 64 S. W. 604, that the Arkansas law of descent was the only law of descent in force in the Creek Nation and the other nations composing the Five Civilized Tribes and the whole Indian Territory up until changed in the Creek Nation by sections 7 and 28 of the Original Creek Agreement. That the Arkensas law of descent was in force in the Creek Nation until repealed by the Original Creek Agreement was held by the United States Supreme Court in *Woodward* v. *deGraffenreid*, 238 U. S. 284, 289, wherein the court said:

> "It is not open to question that at the death of Agnes Hawes (June 29, 1900) the Arkansas law of descent was in force in the Creek Nation. This court, in a recent decision, pointed out the successive acts of legislation, culminat-

ing in sections 26 and 28 of the Curtis Act itself, by which Congress had displaced the tribal laws of descent and distribution and substituted the Arkansas law as expressed in chapter 49 of Mansfield's Digest. *Washington* v. *Miller,* 235 U. S. 422, 424. But, as shown in that case (p. 425), the Original Creek Agreement contained provisions which reinstated the Creek laws of descent and distribution for certain purposes affecting the allotments in that nation. Whether they apply to the present case is a subordinate question, to be discussed in its order."

The same thing was held in *Johnson* v. *Simpson,* 40 Okla. 413, 139 Pac. 129.

Section 7 of the Original Creek Agreement (31 Stat. L. 861), substituted the Creek law of descent for the Arkansas law in the Creek Nation in so far only as the descent of the allotment from the allottee was concerned. In other words, the general law of descent was amended as to allotments in the Creek Nation, by the Original Creek Agreement, and Creek allotments were eliminated from the scope and force of that general law of descent in force in the whole Indian Territory. Until that time, as above shown, the Arkansas law as the general law of descent throughout the Indian Territory was applicable to the Creeks and all other tribal members, "irrespective of race," and the Original Creek Agreement was

a repeal of the general law to the extent that it removed from the scope of the general law a particular class of property, to-wit: Creek allotments, and provided for that particular class of allotments another law of descent. That other law of descent was the Creek law, and was special in that it had no force or effect throughout the Indian Territory except in the Creek Nation, with respect to the devolution of allotted lands. In other words, a Creek citizen's personal property, as well as any real estate he acquired by purchase or inheritance, remained subject to the Arkansas law of descent. The Creek law of descent thus had a very limited field even in the Creek Nation. It was a special law applicable to a special subject, to-wit: the inheritance of Creek allotments. The Original Creek Agreement did not undertake to provide for a general law of descent and distribution in the Creek Nation, but merely carved out a particular class of property of a particular class of persons from the general law of descent in force throughout the territory.

The Act of Congress approved May 27, 1902 (32 Stat. L. 245), provided "That the act entitled 'An act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and for other purposes,' approved March first, nineteen hundred and one, in so far as it provides for descent and distribu-

tion according to the laws of the Creek Nation, is hereby repealed," and to leave no doubt that the general law of descent and distribution should thereafter control in the Creek Nation, further declared that "the descent and distribution of lands and moneys provided for in said act shall be in accordance with the provisions of chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory." This Act of Congress of May 27, 1902, had no other greater or further effect than to bring back under the Arkansas law of descent, the general law of descent in force in the Indian Territory, a particular class of property belonging to a certain class of persons taken out from under the scope of the general law of descent by the Original Creek Agreement in 1901. The Act of Congress of May 27, 1902, was an amendment of the general law and simply restored to the general law of descent Creek allotments. *That is to say, from and after the 1st of July, 1902, Creek citizens' allotments were subject to the same general law of descent applicable to the devolution of their personal property and real estate acquired by them by purchase or inheritance from other persons, that is, under the general law in force throughout the Indian Territory "irrespective of race."*

The common law rule of statutory construction is that when a repealing statute (Original Creek

Agreement in this case) is itself repealed, the first statute (the Arkansas law of descent in general in this case) is revived without formal words for that purpose. This rule is well settled by the authorities.

—36 Cyc 1099.

The rule that the repeal of a repealing statute revives the original statute is supported by a long list of authorities cited by Sutherland on Statutory Construction, Vol. I, Sec. 288. This was the rule with respect to Acts of Congress until the Act of Congress of February 25, 1871.

Now, section 12 of the revised statutes declares that "whenever an act is repealed which repealed a former act, such former act shall not thereby be revived, *unless it shall be expressly so provided.*"

In *United States* v. *Philbrick*, 120 U. S. 52, 30 L. ed. 559, Mr. Justice HARLAN, in discussing the effect of the Act of Congress of 1866 on the Act of 1835, said:

> "When the Act of 1866 simply removed the prohibition contained in the Act of 1835, the effect was, *without formal words for that purpose*, to restore the law as it was before the passage of the *latter act*. Such is the rule where the effect of the repealing statute is not by its own terms, or by some general statute limited to the abrogation of the act repealed."

But in the Act of Congress of May 27, 1902, and also section 6 of the Supplemental Creek Agreement, Congress expressly, as required by the Act of February 25, 1871, provided that the general law, the Arkansas law of descent, repealed by the Original Creek Agreement, should be revived. The Supplemental Agreement with the Creeks, approved by Act of Congress of June 30, 1902 (32 Stat. L. 500), and finally effective by proclamation of the President of the United States, August 8, 1902, section 6 thereof is as follows:

> "The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, *and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas NOW IN FORCE IN INDIAN TERRITORY: Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

The court will notice that this section 6 is, down to the proviso, in reference to non-citizens, exactly

the same language used in the act approved May 27, 1902. Neither the Act of Congress of May 27, 1902 (32 St. L. 245), nor section 6 of the Supplemental Agreement, undertook to put the Arkansas law of descent in force in the Creek Nation with respect to any subject other than the *land and money provided for by the Original Creek Agreement*, that is, allotments and the distributive share of the funds of the tribe. This shows that Congress clearly understood that the Arkansas law of descent and distribution was in full force and effect in the Creek Nation before the Supplemental Agreement as well as after with respect to all classes of property except allotments and tribal funds.

Between July 1, 1902, and August 8, 1902, being the period between the date the Act of Congress of May 27, 1902, went into effect and the day the Supplemental Creek Agreement went into effect, there can certainly be no doubt about the Arkansas law of descent being in force in the Creek Nation as a general law on that subject throughout the entire Indian Territory. The Creek allotments were brought back under the scope of the Arkansas law as a general law, and remained under that general law of descent without qualification from July 1, 1902, until August 8, 1902, when the proviso to section 6 limited the inheritance of allotments to Creek citizens

and their Creek descendents. Insofar as section 6 of the Original Creek Agreement undertook to repeal the Creek law of descent and distribution in the Creek Nation it had no effect whatever, or field for operation, because that had been fully accomplished by the Act of Congress of May 27, 1902. (32 St. L. 245.) So at the time the Supplemental Agreement became operative that part of section 6 repealing the Creek law of descent and putting in force the Arkansas law of descent as to allotments was of no force or effect. It was futile, had no field for operation, and amounted to no more than that many meaningless words. The proviso, however, limiting the descent to Creek citizens and their Creek descendants, was effective legislation because it was entirely new.

Point Six.

Plaintiffs are not heirs under the Oklahoma law of descent.

The allotment of Peggie Ann Jefferson was not inherited by her from her parents, is in no sense an inheritance, and its devolution under the Oklahoma law is in no way controlled by the so-called Shulthis doctrine of ancestral estates—we mean *Shulthis* v. *McDougal*, 170 Fed. 529, and *McDougal* v. *McKay*, 237 U. S. 372. These decisions construed the Arkansas law of descent. This court will follow the Oklahoma Supreme Court in its construction of the Oklahoma statutes of descent.

—*Wicomico County Comrs.* v. *Bancroft*, 203, U. S. 118;

Gatewood v. *North Carolina*, 203 U. S. 541;

Yazoo & M. V. R. Co. v. *Adams*, 181 U. S. 580.

Plaintiffs, however, claim under the 7th paragraph of section 8418 of the Oklahoma Laws of 1910, said 7th paragraph being as follows:

> "If the decedent leaves several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such

decedent, descends in equal shares to the other children of the same parent, and to the issue of and such other children who are dead, by right of representation."

The Supreme Court of the State has construed that statute with respect to allotments not only in this case, but also in *Crouthamel* v. *Welch*, 156 Pac. 302.

The Arkansas statute of descent was clearly a misfit as expressly stated by the Eighth Circuit Court of Appeals in *Shulthis* v. *McDougal*, 170 Fed. 529, and recognized by this court in *McDougal* v. *McKay*, 237 U. S. 372, but the Oklahoma law of descent is not a misfit.

Plaintiffs contend that Peggie Ann Jefferson inherited one-half of this allotment from her mother, but the trouble is that her mother never owned this land and it was never any part of her estate. The above section of the Oklahoma statute relied upon by plaintiffs originated in Massachusetts, and has been in force in several states and its construction well settled by judicial decisions. It only applies in cases where the parent dies leaving a minor child who dies prior to marriage, and under these circumstances the interest inherited by such child is treated as never having been inherited by the child, but is distributed to the other heirs of the parent as a part of

the estate of the parent. As said by the Massachusetts Supreme Court in *Nash* v. *Cutler*, 16 Pick. 491, "It is rather giving a new destination to that portion of the parent's estate, which has in some measure failed to accomplish the design of the legislature by the premature death of such child, than to provide a new and distinct rule of distribution for such child's own estate."

The following decisions likewise construe such statute:

Perkins v. *Simonds*, 28 Wis. 94;
Burke v. *Burke*, 34 Mich. 452;
Goodrich v. *Adams*, 138 Mass. 553;
In Re Estate of Mary Jane Donahue, 36 Cal. 329;
Patterson v. *Lanson*, 45 Ohio St. 77;
Cutter v. *Waddington*, 22 Mo. 206;
Case v. *Wildredge*, 4 Ind. 51;
Shepard v. *Taylor*, 3 Atl. 382;
Smith's Executor v. *Smith*, 2 Bush. (Ky.) 520;
Wiesner v. *Zann*, 39 Wis. 189;
Appeal of Hale, 38 Atl. 392 (Conn.);
Terry's Appeal, 28 Conn. 339;
Clarke v. *Pickering*, 16 N. H. 284;
Mayo v. *Boyd*, 3 Mass. 13;
Sheffield v. *Lovering*, 12 Mass. 490.

This court, under a long line of decisions, is bound by the construction given to the Oklahoma statute by the highest court of that state.

We, therefore, respectfully submit that this court should hold that the Oklahoma statutes of descent are *unqualifiedly* in full force with respect to the devolution of all allotted lands in the Creek Nation and affirm the case.

Respectfully submitted,

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APPENDIX.

Original Creek Treaty.

(31 St. L. 861.)

7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: Provided, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him.

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation.

Supplemental Creek Agreement.

(32 St. L. 500.)

6. The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of *land and money* provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: Provided, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And provided further, That if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in said chapter 49.

Supplemental Creek Agreement.

(32 St. L. 500.)

16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free

from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

Enabling Act.

(34 Stat. L. 267.)

Section 1. *Authority of United States Over Persons or Property of Indians and Their Rights Unimpaired. Provided,* That nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1917.

No. 242.

GRANT N. JEFFERSON, MATTIE R. WASSON, and WILLIE NOLAND JEFFERSON, Who Sues by His Guardian, JOHN J. JEFFERSON, Jr., - - - - - - - - - - - - *Plaintiffs in Error,*

vs.

WILLIAM J. COOK and ALBERT Z. ENGLISH, as Administrators of the Estate of F. B. SEVERS, Deceased, *et al.*, - - - - *Defendants in Error.*

BRIEF BY JOHN B. CAMPBELL, *AMICUS CURIÆ.*

May It Please the Court:

We file this brief by leave of Court. We are not attorneys in the case, but are attorneys in two other cases which will come to this Court for consideration of the same law to be construed in this present case. We are interested, therefore, very much in the outcome of this case.

Statement of Facts.

Bettie Ann Jefferson, a minor Freedman member of the Creek Nation of Indians, departed this life June 4, 1908, and after the erection of the State of Oklahoma. She had never married and left no issue. At the time of her death, said Bettie Ann was seized and possessed of One Hundred and Sixty (160) acres of land, the same having come to her as her share and portion of the lands of said Creek Nation, in the division and partition of said lands to the members, in severalty, under the provisions of the Supplemental Creek Treaty. (32 Stat. L. 500). It was the allotment, homestead and surplus, of said Bettie Ann. All of the land at the time of her death was restricted land, though her death operated to remove the restrictions.

Said Bettie Ann was survived by kindred of the blood of her father, and kindred of the blood of her mother. The kindred of the blood of her father, as well as the kindred of the blood of her mother, were citizens of the Creek Nation. Who were the heirs of said Bettie Ann? If the provisions of the Creek Treaty aforesaid, under which the allotment was made to said Bettie Ann, are in force to govern the devolution of her allotted lands, then these lands, coming to her as an estate of inheritance, pass back to the line, or lines, from whence it came to her, and

as each of her parents were Creek citizens, the land came to her, concurrently, by the blood of each parent, and on her death, would ascend in equal parts to each parent, or his or her heirs, and each part would continue in the line, where cast, not in postponement, but to the exclusion of the other line, never going to this other line until the extinction of the line in which it was cast. This in accordance with the laws of descent and distribution of the State of Arkansas, the law put in force to govern the devolution of allotted lands by the Creek Treaty aforesaid.

The case of *Kelly* v. *McGuire*, 15 Ark. 555, is the one case of the Arkansas Court, which must be read and studied to understand the Arkansas law of descent. The opinion in this case is one of the best on descent and distribution written by American Judges. It is little read or heard of outside of Arkansas, and the Eastern half of Oklahoma. It was written in a bona fide case, but with the design of placing a construction on the very complicated Arkansas laws of descent and distribution, and in this wise: the case of *Kelly* v. *McGuire*, was before the Court. It presented many questions. Mr. Hempstead, a very eminent lawyer of Arkansas, was selected and made a Special Judge of the Supreme Court of Arkansas, for the sole purpose of writing the opinion in this case. He was engaged at it nearly a year, and the result was to reduce the twenty-two

sections of the Arkansas law into eight propositions, and these eight propositions have been treated to all intents and purposes, almost as substitute for the Arkansas law since that time. They became rules of property and no one may understand the Arkansas law of descent and distribution without consulting this opinion of Judge Hempstead.

If, however, the laws of descent of the Treaty do not govern the devolution of the lands allotted to Bettie Ann, but where in fact repealed by the provisions of the Enabling Act of Oklahoma, (34 St. L. 267), or the Constitution of Oklahoma, adopted under the power of an Enabling Act, then on the death of Bettie Ann, her allotted lands passed to her heirs under the law of descent of the State of Oklahoma, and the father was preferred.

Which law of descent, the law of the Treaty—the same being the Arkansas law—or the Oklahoma law, govern the devolution of the allotted lands of the Creek Nation on the first cast? This is the question before the Court. The decision of the Court will apply to all of the allotted lands of Indian Territory where death of the allottee (he being then seized of his allotment), occurred since the erection of the State of Oklahoma. It will thus be seen that the question here involved, is one of very great importance in that part of Oklahoma, which was formerly Indian Territory.

We have now stated the necessary facts, the propositions involved, and the sole question for decision. The lower Courts held that the Oklahoma law of descent governed. There is a Federal question involved, and the case was brought by appeal to this Court.

We contend that the law of the Agreement under which the lands were allotted govern.

BRIEF *of the* ARGUMENT.

All of the opinion of Mr. Justice HUGHES in the case of *Washington* v. *Miller* (235 U. S. 422), is applicable to a true understanding and determination of the law of this case. It is a matter worthy of comment that this very important case on descent of these Indian lands is not referred to in defendants in error's brief. We here refer to the *Washington* v. *Miller* case, and make all of the opinion of Mr. Justice HUGHES a part of our argument. The *Washington* v. *Miller* case brings us, chronologically, to the very law now to be considered. We must now construe the very next enactment of Congress, after the enactments discussed in the *Miller* case. In fact, the specific Acts of Congress and Treaty provisions touching descent, were the same at the time the de-

scent was cast in the *Miller* case, and at the time the descent was cast in the case at bar. But after descent cast in the *Miller* case, and before descent cast in the present case, Congress had passed the Enabling Act for Oklahoma, and Oklahoma, embracing Indian Territory, had adopted a constitution and had become a State. The further question, now, after the *Miller* decision is, what is the effect of the language of the Enabling Act putting in force the laws of the Territory of Oklahoma, over the new State of Oklahoma, and the effect of the Constitutional provision in conformity therewith? This language being to the effect that all Oklahoma Territorial laws not locally inapplicable, shall be so put in force over the new State, and also, certain reservations in Congress, as to the Indians, their lands and money. Here we are, after the *Miller* decision, ready for a discussion of the next enactment by Congress, to-wit: The Enabling Act.

Counsel for defendant in error make the argument that the Oklahoma Territorial Laws were put in force over the State by the State Constitution and not by the Enabling Act. Possibly so, but what difference does it make? If so, it was under the power of the Enabling Act. A discussion of this question will not help us arrive at a true interpretation of the law as applicable to the case at bar. The fact is, that either by the Enabling Act, or by the Constitution

adopted under the power of the Enabling Act, the Oklahoma Territorial Laws, so far as applicable, were put in force in the State of Oklahoma, and this prior to descent cast of the lands here in controversy.

We think we will save time by stating here a number of argumentative propositions. Some will be made without argument, and some with a brief argument in connection therewith. They are all necessary of consideration in arriving at an understanding of the one question later reserved for argument, to-wit: Was the law of descent and distribution of the Creek Treaty repealed by the Enabling Act, and the Constitution adopted under the power of the Enabling Act, and the Oklahoma law of descent and distribution substituted in lieu thereof?

First. Of the enumerated power of Congress, we find in the Constitution the power "to provide for the general welfare," and to "regulate commerce with the Indian Tribes," and the Courts have invariably held that Congress under these powers has original jurisdiction over the Indians, their money and land, until such time as this power, in any particular, may be delegated to the State.

Second. Congress has never delegated to any State, any of its inherent powers over the Indians,

their money and land, except by specific Act of Congress.

Third. No one now doubts that the Act of Congress of March 3, 1871, (16 Stat. L. 570), means other than what it says, when it says, that Congress shall hereafter deal with the Indians, not by Treaty, but by Act of Congress. No one doubts that Treaties with the Indians are simply Acts of Congress, and can be changed by Congress at will, provided vested rights have been attached. This Court has in many cases made this clear.

Fourth. The persons, property, lands, moneys, and affairs of the Five Civilized Tribes of Indians, have for years been determined and administered under *special Acts of Congress, and no general Act of Congress, relative to Indians, their lands and moneys, has been applicable.* The Five Civilized Tribes have been excepted from the operation of all general Indian legislation, and laws applicable to these Five Tribes have been by special enactment, and by express mention.

Fifth. The General Allotment Act of 1887, as amended February 28, 1891 (26 Stat. L. 794), under which most of the Indian lands of the States and Territories was allotted, provided, by Section 5, that on the Territory's admission as a State, the law of

descent of the State should govern the devolution of allotted lands. This Section is not applicable to the Five Tribes. Yet it has been the cause of our uncertainty here. Why? As we run our digests for authorities, we find case after case in which it is held that after the admission of the State, the State laws of descent and distribution govern the devolution of Indian allotted land. These cases all have reference to allotments made under the General Allotment Act aforesaid, wherein it was specifically provided that the State law should govern. But the allotment Acts under which the lands of the Five Tribes were allotted, did not provide that on and after Statehood, the State laws should govern the devolution of these allotments, and the provision of the general allotment Act is not applicable.

Sixth. No State of the Union on admission had power over Indians, their lands and moneys, including descent and distribution, except by specific Act of Congress delegating such power. This Court has held that in the absence of statutory provision, the Tribal law of descent will govern, even after Statehood of the State, wherein the Indians reside and have their lands, and the State law will govern only in the absence of a Tribal law or custom of descent. Later in this Brief, we will cite these authorities and quote from the opinions.

Seventh. The language of the Enabling Act, the power under which the Constitution of Oklahoma was adopted, clearly intends to reserve to Congress all power then held by Congress, and did not abrogate or repeal a single provision of the laws and Treaties under which the lands and moneys of the Five Tribes had been, and were then being, partitioned and distributed, and the affairs of said Nations being finally wound up. This is shown clearly by Congress when, after Statehood of Oklahoma, and by Section 9 of the Act of Congress, approved May 27, 1908 (35 Stat. L. 312), and effective sitxy days thereafter, it enacts a law of descent as to the homestead allotments of citizens who had children born to them too late to secure allotments themselves, and reserving these homestead allotments to these children. It is shown by the grant of power to the Probate Courts of Oklahoma by Section 6 of this same Act. It is shown by the grant of power to tax certain lands as shown by Section 4 of this same Act, and this latter Section is the answer to the misleading argument in defendants in error's brief, at page 67. It is shown by Section 8 of this same Act, providing for making of wills. We might cite many other instances where, since Statehood, provisions of the Treaties and laws of C o n g r e s s have been nullified, and the power to deal with these subjects delegated to the State. We might cite enactments,

before Statehood, where Congress had provided for delegation of power to State, in the event of Statehood. See Section 22, Act of Congress, April 26, 1906 (34 Stat. L. 137). There is none, however, on descent and distribution. Congress does, however, exercise its power on this subject, after Statehood, and by Section 9, aforesaid. A very significant fact.

Eighth. Intelligent understanding of the language of Section 1 of the Enabling Act for Oklahoma places the question beyond peradventure. This is quoted on page 20 of this brief.

Either this language must be read with the conviction that Congress had no doubt of its jurisdiction in matters provided for by prior Treaties and laws affecting these Tribes, and the continued exercise of that jurisdiction, or, Congress has done something amounting to an absurdity. Why absurd? Because if the above language does not mean that which we have suggested as the conviction of Congress, then, because of no express reservation as to the then jurisdiction, and its continuance, and reservation only of the right to enact laws on the same subjects in the future, as counsel suggest, all powers under the provisions of the Treaties and Acts of Congress are gone, and all of these matters have passed to State authority, *but Congress reserves the right to re-enact these laws.*

Can there be any doubt that Congress thought that it was reserving the right to continue the work started by it, in the manner the Treaties provided? Is there any doubt that Congress did retain this power? Was there any necessity for express reservation? Would not express reservation have been surplusage? We can arrive at no other conclusion, and it is difficult, indeed, for us to see any authority for the contention that State laws were substituted for any provision of these Treaties and Acts of Congress, relative to these Indians, their lands and moneys.

Ninth. By the adoption of the Arkansas law by Section 6 of the Supplemental Creek Agreement, the Creeks thereby made it their own, their national law of descent and distribution. True, Congress had and has the right to change that law as it has any other law of its own making, whether of its own individual making, or by concurrence with the Creeks. But Congress has not changed that law, except as to homesteads, which by enactment, after Statehood, it reserved to children born to allottees, and born too late to secure allotments for themselves.

It is said, and properly said, by counsel for defendants in error, that when Congress put the Arkansas law of descent and distribution in force over the Five Civilized Tribes, (it did put these laws in

force o v e r all Five Tribes, absolutely, and not partially as stated in defendants in error's brief), the result was to make these laws F e d e r a l laws. True, but on ratification of the Treaty, the Creeks also made these laws their laws. Certainly counsel will not contend, in their insistence that the Oklahoma laws were put in force, that these Oklahoma laws were put in force as, and are, Federal laws. If not, and the authority was delegated to the State, what power has Congress to enact laws of descent in Oklahoma after Statehood, as it did by Section 9 of the Act of Congress May 27, 1908, *supra*? If so, *i. e.* if Federal laws, do State laws of descent, enacted since Statehood—and the Oklahoma laws of descent and distribution have been amended since Statehood—have any effect on the devolution of the Indian allotted land? In a nut-shell, can Congress and the Legislature of Oklahoma, both enact laws governing the devolution of the allotted lands of the Five Civilized Tribes? If not, in which body is this power? To us there is but one answer to all these questions, and that is, that Congress delegated by the Enabling Act no power over any subject-matter otherwise provided for by the provisions of any one of the Treaties with the Five Civilized Tribes, and under which allotments had been, and were then being, made.

Counsel for defendant in error put forward a most remarkable contention. Its wording is to the effect that if Congress admitted Oklahoma with any reservation to itself on any subject covered by the provisions of any of the Indian Treaties or Acts of Congress relative to these Indian Tribes other than the administrative work of allotting the lands, and possibly the restrictions thereon, then Oklahoma was admitted not on an equality with other States. We have read and re-read this discussion and can make nothing else out of it. This is not so, and we believe that Congress could, and did, reserve to itself, the future enactment, and the keeping in force of every provision of every prior law and Treaty, and that every provision of these laws and Treaties were in force after Statehood, and prohibited from change or variation by the State, and still Oklahoma was admitted on an equality with other States, and we believe this Court will so hold regardless of the fact of whether it says Congress delegated to, or did not delegate to, the State of Oklahoma, power to provide for the descent of Indian lands of the Five Civilized Tribes. In discussing this matter we find our greatest difficulty to be in proving a jurisdiction, always exercised and never questioned. It's like proving a maxim.

Tenth. At the time of Statehood of Oklahoma, the work of allotting the lands of the Five Tribes, was not completed. There have been some Twelve Thousand allotments made since Statehood (see Appendix A). Were these allotments made, and the land held, under Treaties and Acts of Congress interpellated and changed where in conflict with the State law? We say no. These allotments were made under the Treaty provisions and Acts of Congress, intact, and no State law had application. What were these Treaties, after Statehood, if this is not so? They had everything to do with these Indians, their lands and moneys, after Statehood, or they had nothing.

Again, by the Creek Treaty, each citizen was to receive One Hundred and Sixty (160) acres of land, of the standard value of Ten Hundred Forty ($1040.00) Dollars. The lands were all appraised. The allotments were to be equalized by payments in cash. None of these equalization payments were made before Statehood. They are now being made. Thousands of citizens have died. It is estimated that one-half of the Creek allottees are dead. These equalization payments are being made to heirs under the law of the Treaty, and this is true regardless of whether the citizen died before or after Statehood. The moneys are distributed thus by order of Comptroller of the Currency. (See Appendix A and opinion of Comptroller later quoted in this brief.)

Eleventh. Congress did not prescribe the form of patents used to convey to Creek citizens, but these patents, when prepared, did, as required by law, recite the power under which they were executed and approved, and the land held in severalty.

Twelfth. The fact that an allottee, or all the members of an Indian Nation, are made citizens of the State, and citizens of the United States, and given power to vote and hold office, in no way removes these Indians from federal guardianship, and does not take from Congress those powers held by Congress, and specifically reserved by the Enabling Act, so long as the Federal Government recognizes the Tribal relations of the Nation. Congress does recognize the Tribal relations of the Creeks. It has a Principal Chief and House of Kings and House of Warriors, and its National Council meets nearly every year. True, its powers have been lessened, but its Tribal existence not questioned. (Citation of authorities later.)

Thirteenth. A number of cases by the Supreme Court of Oklahoma, holding as that court did in this case, have been cited to show that this ruling has now become a rule of property in Oklahoma. The fact is, that the Oklahoma Supreme Court never seriously considered the question until the case of *Thompson* v. *Cornelius*, 155 Pac. 602. This case, so decided,

in the face of an insistent demand that the law of the Treaty should govern—a demand insisted on by thousands of citizens affected, and who have at all times, and do now, insist that the law of the Treaty should govern—and so decided in the face of the fact that the Department of the Government charged with the duty of carrying out the provisions of the Treaties, have followed the law of the Treaty at all times since Statehood.

The reasons heard, for declaring rules of property in Oklahoma, to-wit: that these Indian questions may be settled and determined as soon as possible, is not a reason for a rule of property. Long lapse of time and acquiescence in the former rule announced are the elements on which this rule is based. Neither exist here. These thousands of citizens should not be judicially foreclosed. The Courts have been years behind their dockets, and these citizens cannot, every one, go to Court. No rule of property on these Indian land questions should be declared until this, the highest Court, has had an opportunity to pass on the question. The reasons given by argument for rules of property here, are the very reasons why rules of property should not be declared.

Again, much that throws light on these Indian questions, is locked up in the Departments of the Government. The public do not know of these matters. But we are gradually learning of them, and in

many instances, these, if known, would have have changed, and might have changed the Courts' holdings. We believe we are warranted in saying that the bench and bar of Oklahoma, on September 29, 1909, when Judge CAMPBELL handed down the decision in the case of *Bartlett* v. *Okla Co.*, 218 Fed. 380, knew nothing of the decision of the Comptroller of September 9, 1909. This *Bartlett* case is the one on which the State Courts base their decisions, and this case refers to cases coming under the general allotment act for its authority.

We believe this general argumentative statement will be helpful to the Court in considering the one question in the case, to-wit:

Did the Enabling Act for Oklahoma, and the Constitution adopted under the power there granted, repeal the provisions of the several treaties with the Five Civilized Tribes, under which the lands of the tribes were allotted to the members in severalty, as to descent and distribution of allotted lands, on first cast, and substitute in lieu thereof, the laws of the Territory of Oklahoma?

We quote the law of the Supplemental Creek Treaty (32 Stat. L. 500):

> *Sec. 6.* "The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and dis-

tribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; And *provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

The Supreme Court of Oklahoma has held that on Statehood, all of said provision was repealed, except, the proviso "that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit," etc. That court killed the enacting clause, and saved the proviso. Counsel for defendants in error say that they have grave doubt as to this holding. Every lawyer must have grave doubt as to its correctness. The rule is that when you repeal the enacting clause, you repeal the proviso; that the proviso falls with the enacting clause. However, the intent of Congress was so clear to the effect that these allotted lands should descend to citizens only, that this provision must be held intact. It was held intact on the theory that it was independent legislation. We cannot follow this argument. We say that

this proviso was repealed with the enacting clause, or the enacting clause was not repealed. Was it repealed, and if so, by what law? By the Enabling Act and Oklahoma State Constitution or not at all. We quote from both.

Sec. 1, Enabling Act: * * * "That nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, *which it would have been competent to make if this Act had never been passed.*"

Sec. 3, Enabling Act: * * * "And said convention shall provide in said Constitution"— * * * "*Third,* That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any *Indian, tribe, or nation;* and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States."

Sec. 21, Enabling Act: * * * "And all laws in force in the Territory of Oklahoma at the

time of the admission of said State into the Union shall be in force throughout said State, *except as modified or changed by this Act or by the Constitution of the State,* and the laws of the United States *not locally inapplicable* shall have the same force and effect within said State as elsewhere within the United States."

Sec. 22, Enabling Act: * * * "That the Constitutional Convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act."

On April 22, 1907, the Constitutional Convention of the proposed State of Oklahoma, accepted the Enabling Act by the following resolution:

"*Be It Ordained by the Constitutional Convention for the Proposed State of Oklahoma:* That said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of the Congress of the United States, entitled, 'An Act to Enable the People of Oklahoma and the Indian Territory to form a Constitution and State Government and be admitted into the Union on an equal footing with the original States'." (Constitution of Oklahoma Snyder 7 page 394.)

Sec. 3, Constitution: "The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any *Indian, tribe, or nation;* and that until the title to any such public land shall have been extinguished by the

United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States."

Sec. 2, Schedule to Constitution: "All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, *and which are not locally inapplicable*, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law."

First, Congress reserved to itself by the Enabling Act the power and authority to pass any Act or resolution or regulation affecting these Indians, their lands and moneys, the same as if the Enabling Act had never been passed. Then Congress said that the Constitutional Convention shall provide that the people of the proposed State shall agree and declare that they forever disclaim any and all right to unappropriated public lands "and to all lands lying within said limits owned or held by any Indian, tribe, or nation," and that the same shall remain subject to the jurisdiction, disposal and control of the United States, and provided further, that the Constitutional Convention should irrevocably accept the provisions of the Enabling Act, and the Constitutional Convention did accept it and did reserve to Congress every power it theretofore had.

And yet, we are told that if this is true, Oklahoma was admitted as a State, not on an equality with other States.

Further, from the fact that no express reservation was made of Treaty provisions, it is said that all provisions of Treaties, ordinarily powers of the State, passed to the State, and every provision of Treaty in conflict therewith was repealed. We cannot believe this to be true.

The question in this case came squarely before the Supreme Court of the State of Kansas in the case of *Brown* v. *Steele,* 23 Kan. 473, and we will quote from this opinion at length. Judge BREWER wrote the opinion.

The facts in this *Brown* case were as follows: The land was patented to Nancy Bluejacket, a Shawnee Indian, under the Treaty of 1854; she was never married; the heirs were a daughter of a brother and the children of a sister. Under the Kansas law each of these heirs would share equally in the inheritance. The sister, however, married a Wyandotte and lived with that tribe and received her land and annuities as a member of the Wyandotte tribe. The brother continued as a Shawnee. Under the tribal law the property must go to the brother, a Shawnee. The lower Court held that the tribal law governed, and Judge BREWER says:

"In other words, the case stands thus: If this land descends in accordance with the Kansas law of inheritance, plaintiffs are entitled to recover; if, by the law of the Shawnee Nation, they have no interest in the property. Which law prevails? We think this question is fully answered by the decision of the Supreme Court of the United States, the court of last resort in such questions in the case of *The Kansas Indians*, 5 Wall 737."

And Mr. BREWER cites from this opinion, and then continues:

"This decision was in 1866. Since then it is not pretended that there has been any Treaty changing their relations to the government, or releasing tribal control of persons or property. Unless, then, within that decision, there has been a voluntary abandonment of tribal organization (and that question is one to be conclusively settled by the political department of the government), the Shawnee law of descents and the decision of the Shawnee Council, are final and conclusive against the plaintiff's rights. That the question of the continuance of the tribal organization is one for the decision of the political department of the government, is also affirmed in *U. S.* v. *Halliday*, 3 Wall. 419, where Mr. Justice MILLER, speaking for the Court, uses this language: 'The facts in the case * * * show distinctly that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said Treaty, that the

tribal organization should be preserved. In reference to all matters of this kind, it is the rule of this Court to follow the action of the Executive and other political departments of the Government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this Court must do the same.' See, also, *Gulf R. Co.* v. *Morris*, 13 Kan. 315.

"It appears that sometime in 1872 the bulk of the Shawnee tribe moved away from Kansas to the Indian Territory, and occupied a part of the Cherokee Reservation; that since then the Government has had no separate agent for that tribe, and that they have not only been domiciled among the Cherokees, but to some extent under the control of the Cherokee Council and united with the Cherokees. As one witness expressed it: 'The Cherokee laws govern us as to general police regulations and crime; the Shawnee Council act as to ownership of property.' If the question were one of fact for original determination, in the Courts, it might be difficult to hold from the testimony that a distinct, independent tribal organization remained. But, as we have seen, that question is for political branch of the Government, and the Courts follow its ruling. Now, it appears that the agent for the Cherokees acts as agent for the Shawnees; that he convenes their Council, that that Council acts upon questions of property and heirship, and that its acts thereon are received and recognized in the Interior Department at Washington; and that, since the decease

of Nancy Bluejacket, and the decision of the Council as to the inheritance of her property, and about the time of the trial of this case in the District Court, the Interior Department promulgated rules and regulations for the conveyance of Shawnee Indian lands in this state, in which the existence of the tribe and the power of its chiefs are distinctly recognized. Under those circumstances, it is not for the Courts to say that the tribal organization has been abandoned. Though the tribe may have dwindled in numbers, though its chief domicile may have been changed, though, for many purposes, it may have been merged into some other tribe, yet, *so long as the government recognized its tribal existence and a tribal control of persons and property, such recognition is conclusive upon the Courts.* This is the substantial question in the case, and the ruling of the District Court was correct."

There can be no question of the tribal existence of the Creeks. True, the tribal courts are abolished, and the powers of the Creek Nation Council and principal chief lessened, but these are still in existence and have certain power and are recognized by Congress.

In the leading case of *Jones* v. *Meehan*, 175 U. S. 1, Mr. Justice Gray, delivering the opinion of the Court, quotes, with approval, the case of *Brown* v. *Steele*. The facts in the case of *Jones* v. *Meehan* are briefly as follows:

Moose Dung and Red Bear were chiefs of the Chippewa Indians, domiciled in the State of Minnesota, and in 1863 this tribe entered into a Treaty with the United States. Later these Indians were declared to be citizens of the United States. By the terms of the Treaty, however, each citizen of the tribe was given 160 acres of land. This land was restricted. Possibly the chiefs were instrumental in securing the Treaty, and they were each given 640 acres. It was designated where this 640 acres should lie, but the land was not actually patented. Moose Dung died in 1872, leaving surviving him three children and three grandchildren, the issue of three other children. Thus, had the laws of Minnesota controlled, Moose Dung would have died leaving six heirs to his property. By the laws and customs of the tribe, however, the eldest son succeeded to the rights and property of the father. Moose Dung, the younger, was the eldest son. After the death of Moose Dung, the elder, Moose Dung, the younger, made application that the land granted his father be set apart to him, the son. The Secretary of the Interior requested facts to show whether or not there were other heirs. Finally the land was set apart to the "heirs of Moose Dung."

In 1891 Moose Dung, Jr., executed and delivered to Meehan a ten-year lease on a part of the property. In 1904, he executed another lease on the same land

to Jones, and latter lease was approved by the Secretary of the Interior. Jones brought suit to cancel the Meehan lease on the ground that the land was restricted land and the lease not approved, and, therefore, void. Mr. Justice GRAY wrote the opinion, and he goes to the bottom of the questions involved. The Court holds that the grant of land to the chiefs does not take the status of other land granted or provided for by the Treaty; that the 640 acres each to the chiefs were restricted in no way.

Then the Court takes up the question of descent. It was shown that the Interior Department took the view that all six heirs took their *pro rata* share on the death of Moose Dung, Sr. Rental money for the land was paid to and receipted for by each of the heirs. It was shown, however, that by the tribal laws and customs the eldest son took the property, and the Court holds that the laws and customs of the tribe govern so long as the United States recognize the tribal existence of the tribe. Mr. Justice GRAY uses the following language:

> "The Department of the Interior appears to have assumed that, upon the death of Moose Dung, the elder, in 1872, the title in his land descended by law to his heirs general, and not to the eldest son only.
>
> "But the elder Chief Moose Dung, being a member of an Indian tribe, *whose tribal organ-*

ization was still recognized by the government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages and customs of the tribe, and not by the law of the State of Minnesota, nor by any action of the Secretary of the Interior.

"In *United States, Davis* v. *Shanks* (1870), 15 Minn. 369, it was adjudged by the Supreme Court of Minnesota that a probate court of the State had no jurisdiction over the estate of a chief of a tribe of Chippewa Indians to whom a section of land, to be located by the Secretary of the Interior, had been 'granted in fee simple' by the Treaty between the United States and that tribe of May 7, 1864 (13 Stat. at L. 693), and had accordingly been located and a patent, therefore, issued to him. See also *Dole* v. *Irish* (1848), 2 Barb. 639; *Hastings* v. *Farmer,* (1850), 4 N. Y. 293, 294.

"In one of the cases reported under the name of *The Kansas Indians* (1866), 5 Wall. 737, *Blue Jacket* v. *Johnson County Comrs.,* 18 L. ed. 667, this Court reversing the judgment of the Supreme Court of Kansas in *Blue Jacket* v. *Johnson County Comrs.,* 3 Kan. 299, held the lands which, pursuant to the Treaty of May 10, 1854, between the United States and the Shawnee Nation of Indians (10 Stat. at L. 1053), had been patented to a chief of that nation, were not subject to taxation by the State of Kansas so long as the tribal organization remained and was recognized by the political department of the Government; and Mr. Justice DAVIS, in delivering judgment, said: 'This people have their

own customs and laws by which they are governed. Because some of those customs have been abandoned, owing to the proximity of their white neighbors, may be an evidence of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved. There is no evidence in the record to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common.' *'As long as the United States recognize their national character, they are under the protection of the Treaties and the laws of Congress, and their property is withdrawn from the operation of state laws.'* 5 Wall, 756, 757, 18 L. ed. 673. See also opinion delivered by Judge Woods, with the concurrence of Mr. Justice Harlan, in the Circuit Court, in *Wau-pe-man-qua* v. *Aldrich* (1886), 28 Fed. Rep. 489, 495.

"Following that decision of this Court, it was held by the Supreme Court of Kansas, in an opinion delivered by Mr. Justice Brewer, that land patented to an Indian woman of the Shawnee tribe under the Treaty of 1854 descended, upon her death, according to the law of her tribe, and not according to the Kansas statute of descents. *Brown* v. *Steele* (1880), 23 Kan. 672

"In *Rechardville* v. *Throp* (1886), 28 Fed. Rep. 52, which concerned the inheritance of land patented by the United States to a member of the confederated tribes of Kaskaskia, Peoria, Pinkeshaw and Wea Indians, and in which there was no evidence of any particular law or custom of those tribes, it was held that the rightful

heirs of the patentee might maintain their title in the Circuit Court of the United States for the district of Kansas against one claiming under a deed from two of those heirs, approved by the Secretary of the Interior upon a certificate of two chiefs of the tribe that the two grantors were the sole heirs of the patentee; Mr. Justice BREWER, then circuit judge, saying that the Secretary of the Interior 'had no judicial power to adjudge a forfeiture, to decide questions of inheritance, or to divest the owner of his title without his knowledge or consent.'

"The title to the strip of land in controversy, having been granted by the United States to the elder chief Moose Dung by the Treaty itself, and having descended upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor of chief, Moose Dung, the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or by Congress, or of the executive departments. The construction of Treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under the Treaty, or to affect titles already granted by the Treaty itself. *Wilson* v. *Wall*, 6 Wall. 83, 89, 18 L. ed. 727, 729; *Reichart* v. *Felps*, 6 Wall, 160, 18 L. ed. 849; *Smith* v. *Stevens*, 10 Wall, 321, 327, 19 L. ed. 833, 935; *Holden* v. *Joy*, 17 Wall, 211, 247, 21 L. ed. 523, 535."

See also:

Guyette v. *Kantz,* 83 Kan. 2;
Peters v. *Martin,* 3 Fed. 252;
Y-ta-tah-wat v. *Rebock,* 104 Fed. 261;
Richardson v. *Thorpe,* 28 Fed. 152;
Hammond v. *Taylor,* 45 Pac. 352;
O'Brain v. *Bagley,* 26 Pac. 428;
Pourier v. *McKinely,* 147 Fed 298.

In discussing the "Enabling Acts" of other States of the Union, the Supreme Court of the United States has used language which is very significant in showing that a law of descent and distribution, or any other law, or Treaty provision, which Congress had enacted, or entered into, affecting the Indian [illegible]s would not be changed by the advent of Statehood, even though there was no reservation of power in the Federal Government in the Enabling Act. In the Oklahoma Enabling Act the reservation of power in the United States is specifically made.

In the case of the *United States* v. *Jack McBratney,* 104 U. S. 621, the facts were as follows: The State of Colorado was admitted into the Union under an Enabling Act in which there was *no reservation of power in the Federal Government.* McBratney was a white man and murdered another white man on the Ute reservation. He was convicted in the United States Courts of murder. He moved in ar-

rest of judgment, claiming that the United States Courts had no jurisdiction, and on motion being denied in the lower court he brought the case to the United States Supreme Court, and Mr. Justice Gray, in delivering the opinion, uses this language:

> "The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the Treaty with the Ute Indians and in the Act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole territory within the limits, including the Ute reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The Courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation, unless so far *as may be necessary to carry out such provisions of the Treaty with the Ute Indians* as remain in force. But the *Treaty contains no stipulations* for the punishment of offenses committed by white men against white men. It follows that the Circuit Court of the United States for the District of Colorado has no jurisdiction of this indictment, but, according to the practice heretofore adopted in like cases, should deliver up the prisoner to the authorities of the State of Colorado to be dealt with according to law. *U. S.* v. *Cisna*, 1 McLean, 254, 265; *Coleman* v. *Tenn.*, 97 U. S. 509, 519 (XXIV, 1118, 1123).

"The record before us *presents no question under the provisions of the Treaty* as to the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, *or the regulation by Congress of the alienation and descent of property* and the government and internal police of the Indians. *The single question that we do or can decide in this case is,* that stated in the certificate of division of opinion, namely: Whether the Circuit Court of the United States for the District of Colorado has jurisdiction of the crime of murder committed by a white man upon a white man within the Ute reservation and within the limits of the State of Colorado; and for reasons above given, that question must be answered in the negative."

In the case of *Pleasant Draper* v. *United States,* 164 U. S. 241, the facts are similar to those of the *McBratney* case. This case arose under the Montana laws and the Enabling Act under which that State was erected was under consideration. There appears to have been no reservation of power in the Federal Government in this Enabling Act and the Court, after announcing the doctrine of "equality of Statehood," held that the State Court had jurisdiction of the case, and closes with this language:

"Of course the construction of the Enabling Act here given is confined exclusively to the issue before us, and, therefore, involves in no way

any of the questions fully reserved in United States v. *McBratney,* 104 U. S. 622 (26:869), *and which are also intended to be fully reserved here."*

Note how carefully the Court curtails the effect of its opinion in each case so as to limit it solely to the matter in hand, and intimates that if a Treaty provision affecting descent and distribution of the Indian citizen or any other Treaty provision had been under discussion the result would have been otherwise. We think the language in these cases shows clearly that such matters as have been the subject of Treaty stipulation has been, and is, reserved to the Federal Government under any and all of the Enabling Acts, whether the reservation be in fact made in the Enabling Act or not.

It is a familiar rule of construction that an interpretation put upon an Act of Congress by the Department charged with its enforcement is to have great weight with the Courts in arriving at the true construction of this law.

Now, the Treaty provisions of each of the Five Civilized Tribes of Indians provided for a standard allotment of land. The Creek allottees were each to receive an allotment appraised at $1,040.00. This was land of the highest appraisement. Those who received land in allotment of less than this amount

were to receive the balance in money. (The maximum amount was later reduced.) The allotments were equalized, or to be equalized in this manner. A similar provision was included in the Seminole Agreement. Accounts were opened with each allottee, and he was charged with the appraised value of the land which had been allotted to him. He must at some future time be paid the difference between the appraised value of the land so allotted and the value of the standard allotment. Sometime he was to receive the equalization payment, which, together with the land that he had received, would equal in value the standard allotment. The equalization payment was in fact a part of his allotment and the same law of descent should govern the descent of this money due, as would govern the descent of his allotment proper. Thousands of these Indians had died prior to Statehood of Oklahoma. None of these Indians had received, prior to his death, his equalization payment. The first payment of this character was made to the Seminoles, and when the department charged with the duty of making the payment began in fact to make the payment they were met at the threshold with this question—under what law of descent and distribution shall the payment be made? The matter was submitted by the Superintendent for the Five Civilized Tribes to the Commissioner of Indian Affairs, and by the Com-

missioner of Indian Affairs to the Secretary of the Interior, and by the Secretary of the Interior to the Comptroller of the Treasury, and on the 29th day of September, 1909, the Comptroller of the Treasury handed down his opinion to the Secretary of the Interior, and in this opinion he reviewed the legislation leading up to allotment of lands, and held that the Arkansas law, as modified by the Seminole Agreement, was the law under which the equalization payment should be made, and he concludes his opinion with the following language:

> "Your second question raises the question whether the recently enacted laws of descent and distribution of the State of Oklahoma governs the distribution of these per capita payments to descendants of these Indians who died after November 16, 1907. It has already been shown in this decision that by an agreement with the tribe of Indians under date of October 7, 1899, ratified by the Act of Congress of June 2, 1900 (31 Stat. 250), and which agreement in so far as it affects the question at issue, reads:
>
> > '*Second.* If any member of the Seminole tribe of Indians shall die after the thirty-first day of December, eighteen hundred and ninety-nine, the lands, money and other property to which he would be entitled, if living, shall descend to his heirs who are Seminole citizens, according to the laws of descent and distribution of the State of Arkansas, and be allotted and dis-

tributed to them, accordingly: *Provided*, That in all cases where such property would descend to the parents under said laws the same shall go first to the mother instead of the father, and then to the brothers and sisters and their heirs, instead of the father.'

"This article settles the law as to the distribution of these per capita payments as to all of these Indians who shall die after the 31st day of December, 1899, unless Congress has by another valid law changed the law of descent as therein set forth. *Congress has passed no such law, and the Enabling Act under which Oklahoma was admitted as a State made it plain that no such effect should be given the law of Oklahoma.*

"It is not readily seen how the admission of the State of Oklahoma, or any law it has seen fit to pass as such State, relative to the descent and distribution of the property of its people, whether white or Indians, affects the law as above set out which Congress declared should govern in the distribution of the per capita payments in question.

"No law passed by a State can affect or repeal a law passed by Congress relative to its dealings with its citizens. There may a question raised whether the law above quoted meant the then existing laws of Arkansas as to the descent and distribution, or the laws of Arkansas as to descent and distribution in force at the time the distribution of these per capita pay-

ments happen to be made. As there has been no change in the laws of Arkansas on these subjects, it is unnecessary to decide such questions.

"I am, therefore, of the opinion that you should distribute these per capita payments to the heirs of these Indians who died after the 31st day of December, 1899, as set out in said agreement with said Indians of October 7, 1899, to-wit: *Under the laws of descent and distribution of Arkansas then in force, observing the proviso relative to parents."*

The Department of the Interior is now, and has been for some time, making the equalization payment to the Creeks, and is making that payment to heirs of allottees under the law of descent and distribution, as provided by Section 6 of the Supplemental Creek Agreement, regardless of whether the citizen died before or after Statehood. In fact, it would be almost impossible for the Department to know when the citizen died. These Indians on the whole are uneducated and unlettered, and have kept no record of the death of their ancestors. They know that this, or that, person died a "little while" or "long time" ago. They do not know the specific date. They know nothing of the change of the laws of descent and distribution. If this payment was to be made now partly under the Arkansas law and partly under the Oklahoma law, it would lead to fraud and error in many cases.

WE SUBMIT:

1. That the State of Oklahoma and Congress may not each pass laws of descent for these Indian tribes. (Both have enacted laws of descent since Statehood.)

2. That even though no r e s e r v a t i o n had been made by the Enabling Act, still there was reserved to Congress every right and power of the Treaties, and that the Treaty provisions, each and every one, remained in force, intact, after Statehood of Oklahoma, except in such instances as Congress may have specifically provided otherwise.

3. That the law of descent and distribution of Section 6 of the Supplemental Creek Treaty, governed the devolution of the allotted lands of Bettie Ann Jefferson.

4. That this judgment of the Supreme Court of Oklahoma should be reversed with instructions.

Respectfully submitted,

JOHN B. CAMPBELL,
Amicus Curiæ.

APPENDIX A.

(Letterhead of the Department of Interior)
Land Office. 125959-17, WHA-KJE 11-24-17. Rel. allotments in Five Tribes since Statehood and distribution Creek equalization money.

Muskogee, Oklahoma,
Nov. 24, 1917.

Mr. J. B. Campbell,
Attorney at Law,
Barnes Bldg., Muskogee, Okla.

Dear Mr. Campbell:

Responsive to your letter of the 10th inst., you are advised that under the rulings of the Honorable Secretary of the Interior and the Solicitor for the Interior Department the money due to equalize Creek allotments is not segregated from the tribal funds until actual payment has been made to the heirs of the deceased enrolled member of the tribe and it must be determined in accordance with the provisions of Section 6 of the Supplemental Creek Agreement (32 Stat. L. 500), whether such allottee died prior or subsequent to Statehood of Oklahoma.

Approximately 12,000 complete or partial allotments have been made to citizens and freedmen of the Five Civilized Tribes since Oklahoma was admitted to Statehood on November 16, 1907.

Sincerely yours,

GABE E. PARKER,
Superintendent for the Five Civilized Tribes.